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# Gender balance on corporate boards in the EU and Italian framework: an appraisal

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*“Luck is what happens when preparation meets opportunity”*

Seneca

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# Introduction

The present study is the result of a personal reflection on the issue of women on corporate boards, that is the object of a drafted directive presented by the EU Commission on 14 November 2012 in order to crack Europe's glass ceiling, and that represents a current challenge for some Member States too. I approach this topic after having attended an advanced training course on diversity management organized by Professor Biancheri of the Faculty of Political Science of the University of Pisa, and after having performed an internship in Brussels in the framework of Erasmus Placement, which gave me the possibility to take part in several seminars and conferences on this issue at the EU Institutions. These two professional experiences, together with a particular interest in gender issues, inspired me to analyze from a legislative and practical point of view the EU lawmaking on gender balance, starting with a first narrow definition provided by the Treaty of Rome up to a proposal for a directive on gender quotas. The same analysis is conducted with reference to one Member State, Italy, which anticipated the adoption of *an hoc* law for gender quotas in 2011. It was chosen due to its welfare model which has in some cases allowed a well-advanced and good quality legislation, even if with some limits on the effectiveness side. Hence, an appraisal of the Italian gender equality situation is realized, valuing the effectiveness of work-life balance policies as well the first outcomes of such law on the chosen Member State and where some failures are found, an attempt to explain main reasons and possible solutions is made. For the evaluation part, I had a direct contact with some representatives of the business sector, which are spokespersons of two different sides of the Italian economic fabric: the large company and the small and medium-sized enterprise. Methodological instruments are thought to be appropriate for each case; a questionnaire was given to the human resources area of the large company chosen for this analysis, and a telephone interview with an expert speaking for small business.

The purpose of this study is to analyze in a legislative and practical way the current issue of women on boards experienced by EU and Italy, in order to create

a greater awareness of a necessary change of approach, that could start through the considered legally binding instrument, in the corporate and academic world as well among small companies. Actually, although these last ones are not directly touched by the law, it may help them too in changing cultural attitudes towards gender equality.

The dissertation is articulated in four chapters. The first chapter concerns EU legislative framework, focusing on those EU Treaties and on those acts which had relevance in the matter of gender balance between men and women. An historical *excursus* was realized in order to attest the evolution of the gender equality's principle, originally having mere economic connotations. With the adoption of the Single European Act, the importance of safety and health at work of men and women emerged as well new competences on this issue were given to the Community; then, thanks to the adoption of the Treaty of Amsterdam positive measures are allowed and gender mainstreaming was chosen by the EU as preferential strategy.

The second chapter represents the focal point of this work: it analyzes the last approach chosen at EU level in order to break the glass-ceiling, which is the proposed directive on gender balance among non-executive directors of publicly listed companies. The chapter reveals, actually, the inadequacy of soft law acts already adopted within the EU in order to increase the number of women in decision-making positions. By the way, it offers an extended discussion on this act, focusing on its lights and shades as well on those points which provoked major discussion.

The third chapter is the one concerning the Italian situation on gender equality: it focuses on legislation, stressing the transition from protective rules for women towards more specific measures that allow specific measures and encourage a better reconciliation between private and professional life. The analysis of legislation attests also that in some cases it goes often beyond what required by EU directives and that in a particular case, as declared before, it anticipates the issue of women on boards in the Italian framework. Hence, the chapter examines all the stages that brought to its adoption, as well the debate arisen around it in the Italian business world.

The conclusive chapter is dedicated to the evaluation research. In the light of the EU and Italian legislative framework on gender balance delineated in previous chapters, the considered one deals with an assessment of Italian situation in order to attest if the expected results have been achieved. For this purpose two different cases are provided: on one hand, the chapter focuses on an Italian large company, the Telecom Italia group, in order to evaluate which have been main outcomes following the adoption of a work/family reconciliation policy, and following the entry into force of Italian law on quotas and the consequent increase of women in the Board of directors. On the other hand, it reveals the divergent situation observed in the majority of Italian companies, which are mostly small and medium-size enterprises; in consequence, it is discussed which could be in this regard the appropriate instrument even for small business apart from the legislative one, in order to face gender imbalance and the lack of reconciliation policies.

# CHAPTER 1

## *A brief overview of EU gender equality legislation*

In the development of EU regulations in the field of equal opportunities it is possible to distinguish some main phases: a first phase of protection for women; a second of positive measures and a last one that deals with gender mainstreaming[1].
When the European Economic Community was set up, little attention was devoted to gender issues. The primary purpose of the Treaty of Rome was, in fact, the creation of a Common Market and the dismantlement of all tariff barriers. In this context, the concept of equality was interpreted only in the idea of equal pay between men and women. Although gender issues were conceived in this restricted way, since then several directives on this issue have been adopted. However, the first Equality Directives were focused only on gender equality in the labour market and regarded both the principle of equal pay and equal treatment. A new stage was marked when, with the signing of the Single European Act much importance was given to matters concerning the health and safety of workers and, at the same time, the basis for a relevant directive related to pregnant workers was provided. Furthermore, thanks to the attachment of the Social Protocol and of the Agreement on Social Policy to the Maastricht Treaty, the Community acquired new legal competences in the field of social policy, and collective bargaining was recognized as an instrument allowed for Member States to implement EU directives.
With the adoption of a gender mainstreaming strategy, the EU community started tackling gender gaps not only with a focus on women, but on men too, at all levels and in all areas. For this purpose, some provisions were strengthened and important documents were adopted. The Treaty of Amsterdam, in fact, amended the equal pay article of the Treaty of Rome and issued well-structured provisions,

[1] Cfr. M. Marcucci, M.I. Vangelisti, *L'evoluzione della normativa di genere in Italia e in Europa*, Banca d'Italia Eurosistema, n. 188, Giugno 2013, pp.5-8.

which allow *inter alia* to adopt positive measures in order to facilitate the exercise of professional activities for the underrepresented sex and to reduce the gender gap. Following the adoption of the Charter of Fundamental Rights, the Recast Directive was adopted in order to reinforce principles already established by previous ones and to include in a single text some relevant directives approved up to that time.

After the approval of the Treaty of Lisbon which qualified gender equality as one of the fundamental values of EU, a directive in the matter of parental leave, which was focused for the first time on men, exemplifies the new approach pursued at EU level.

## 1. The economic aim of article 119 of the Treaty of Rome and the *Defrenne* case

Among the early provisions of the European Union *acquis*, only one single article of the Treaty of Rome was included to combat gender discrimination. Article 119 of the Treaty[2] could be considered, in fact, the historical starting point of the development of equality legislation. Although it represented a first milestone in this field, it is important not to underestimate the background against which this principle arose and its primary purpose: due to the main aim of creating a Common Market and therefore the primacy of economic interests, equality provision was solely devoted to improving the welfare employment conditions of women[3]. For this reasons, the aim of equality concerned, in this first phase, only the achievement of equal pay between men and women.

The article established that each Member State shall, during the first stage, ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work. Furthermore, it gave a definition of what equal pay without discrimination based on sex means, that is that pay for the

[2] Future article 141 TEC, currently article 157 TFUE.

[3] In particular, given that France was the only Member State which had adopted provisions on equal pay between men and women much earlier, it worried that low-quality female labour in other Member States would put French undertakings and the economy at a disadvantage.

same work shall be calculated on the basis of the same unit of measurement; and that pay for work at time rates shall be the same for the same job.

Despite the fact that it represented an important step towards the affirmation of equal rights between men and women, the Article reveals some weaknesses especially in the matter of formal and substantive equality.[4] Primarily, it applies a very narrow definition of equality, in accordance with which equality is equivalent to equal pay. Secondly, it did not cover indirect discrimination: this gap confirmed the overwhelming economic impetus of the Treaty and the insufficiency of social provisions. Thirdly, in this first phase member states were not committed to implementing this principle.[5] It is in relation to this third point that the Court of Justice of the European Union played a very important role. Through the Defrenne/Sabena case[6], in fact, the Court of Justice stated that article 119 of the Treaty had an obligatory nature and thereby affirmed its direct effect in the case of direct and overt discrimination, which means that individuals can effectively invoke their right to gender equality before national courts, and Member States have the duty to comply with such provisions.[7] Furthermore, the Court established the binding nature of the Article in the public and private sector of the labour market: it became mandatory not only for the action of public authorities and citizens, but was also extended to actions between citizens and private companies.

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[4] The principle of formal equality, as expressed in the articles 21, 22, 23 of the Treaty of Nice and in the article 3 of Italian Constitution, refers to the equality of citizens before the law without distinctions of sex, race, language, religion, political or any other opinion. In terms of substantive equality, this is understood to mean that the commitment of the European Union is to remove all the economic and social obstacles and to promote support policy in order to provide complete satisfaction of equal opportunities.
On this issue, see: M. Tatarelli, *La donna nel rapporto di lavoro*, Cedam, 1994, pp. 3-4.

[5] The total absence of political commitment towards the principle of equal pay is made evident by the fact that Member States did not implement this article, in spite of the fact that Article 119 should have been implemented before 1 January 1962.

[6] ECJ, Case 43-75, *Gabrielle Defrenne v. Sabena* , 8 april 1976, ECR 1976, 455.
Miss Defrenne was a flight attendant with the Belgian National airline Sabena, whose employment contract was terminated when she reached the age of 40, under a rule that did not apply to male members of the crew.
Full text available on the website:
http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61975CJ0043:EN:PDF

[7] R. Guerrina *Mothering the Union – Gender Politics in the EU*, Manchester- New York, Manchester University Press, 2005, pp. 44-45.

In conclusion, as result of this action, the dual purpose of Article 119[8] was affirmed: it was interpreted as having an economic function, avoiding the distortion of competition, as well a social one[9], which was included only in order to enhance the Community's economic objectives.

## 2. The Equal pay directive

The directive 75/117/EEC was the first form of EU binding secondary law on equality between women and men, although it focused only on the specific issue of equal pay. The main purpose of the Council was, in fact, the "reinforcement of the basic laws with a standard aimed at facilitating the practical application of the principle of equality to enable all employees in the Community to be protected".[10] Nevertheless, as the directive was based on article 100 of the Treaty of Rome, the Council acting unanimously, aimed also at issuing a directive in order to approximate those provisions laid down in Member States that directly affect the functioning of the common market.

In giving a definition of the principle of equal pay, Article 1 of the directive contained a reference to Article 119 of the Treaty of Rome[11] which, as stated before, was not implemented before the deadline: it is possible to deduce that the adoption of the directive represented the implicit admission of the failure of the European Economic Treaty in this field and of Member States too, which did not

[8] Ivi, p. 46.

[9] In order to fulfill the purposes of Article 117, which states that "Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained" (Article 117 of the Treaty of Rome).

[10] The full text of the 75/117/EEC is available on the website: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31975L0117

[11] "The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called 'principle of equal pay', means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration." (Article 1)

successfully put into effect the principles issued by the Article in question[12]. Furthermore, the directive was also a direct result of the 1974 Social Action Program[13], adopted through the Council Resolution of 21 January 1974.

In relation to the new elements introduced by the directive, it expanded the principle of equal pay for equal work, introducing the concept of work of equal value, which entails that, "where a job classification system is used for determining pay, it must be based on the same criteria for both men and women" (Article 1). Through the introduction of this principle, the concept of indirect discrimination, although not yet explicitly mentioned[14], was also included within the general purpose of the directive: the acknowledgement of structural inequalities and their impact on the European labour market[15], allowed in this way the widening of Equal Pay legislation of this period and the willingness to deal with these disparities of access to power and resources[16]. Nevertheless, as several academics have pointed out, this legislation can only be effective in areas where both men and women are employed. In fact, although through this principle a legislative framework for the development of women's employment rights has been established, this policy failed to consider the link between public and private, focusing only on the public sphere and reinforcing the division between paid and unpaid work. [17] Moreover, in this initial phase, this area of law dealt only with its public function, defined as infrastructural, implying that in terms of the law it

[12] Their lack of commitment was evident in the 1961 Commission Recommendation and the Council Resolution.

[13] The 1974 Social Action Program tried to expand the focus of European social policies. The program was addressed to: undertaking action with the aim of achieving equality between men and women; ensuring that family responsibilities of all concerned may be reconciled with their job aspiration.
The document is available at:
http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:31974Y0212(01)

[14] In fact, indirect discrimination will be clearly acknowledged only with the 2000/43/EC Directive Implementing the Principle of Equal Treatment between person irrespective of racial and ethnic origin and the 2000/78/EC Directive establishing a General Framework for Equal Treatment in employment and occupation.

[15] The directive tried to face these inequalities in a concrete way ensuring that "provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay may be declared null and void or may be amended" (Article 4) and protecting" employees as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal pay." (Article 6)

[16] R. Guerrina, *Mothering the Union – Gender Politics in the EU*, Manchester- New York, Manchester University Press, 2005, pp.46-47.

[17] Ivi, p.48.

regulates relationships among public authorities, as well as between public authorities and private partners, but not between private persons. In both context the principle of equality is a tool that, through legislation gives shape to the infrastructure of European societies. In practice, this tendency could be demonstrated by the fact that the Equal Pay Directive, despite being intended to affect both public and private practices, intervened in private relationships primarily through obligations imposed on Member States[18].

In conclusion, we can affirm that despite some strong points of this directive, such as its binding nature and the acknowledgment of indirect discrimination, the issue of equal pay was not resolved with the implementation of this directive. In fact, the Code of Practice on the Implementation of Equal Pay for Work of Equal Value[19], published by the European Commission in 1996, showed that there was still a huge salary differential between men and women. Consequently, we can assume that this legislation did not tackle the root causes of inequality.

## 3. The Equal Treatment Directives (76/207/EEC as amended by 2002/73/EC)

The adoption in 1976 of the Equal Treatment Directive, officially "Directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training, promotion and working conditions", represented a further step in the EU equality agenda. Particularly, it underlined the awareness of the Council which voted unanimously[20], that equal

[18] E. Miur, *The Transformative Function of EU Equality Law*, in "European Review of Private Law", 21, 2013, n.5/6, pp.1233- 1239.

[19] This is a communication from the EU Commission, published in 1996, that analyzes in a very practical way different reasons and answers to the issue of pay gender differences. For more information:
http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1996:0336:FIN:EN:PDF

[20] It must be remembered that the Treaty of Rome conferred to the European Parliament only an advisory role in the legislative process, while effective decisional powers were given to the Council which, once the Commission had presented its proposal could, acting unanimously, officially adopt the act.

access to employment is a necessary precondition for equality of pay and opportunities.

In order to assure the equal access to employment, the directive declared its purpose of guaranteeing the right to equal treatment (article 1, paragraph1): to put it successfully into practice discrimination on the grounds of sex, both direct and indirect, by reference to marital or family status are forbidden (Article 2, paragraph 2) and some form of protection for pregnant workers could be institutionalized (Article 2, paragraph 3).

Nevertheless, it is possible to note that this Second Equality Directive merely mentioned the category of pregnant workers, rather than effectively promoting women's employment and equality in the official labour market.[21] EU policy makers, in fact, focused on formal equality, instead of dealing with substantive equality, which would be achievable by considering the real causes of sexual differences and their impact on the practice, as well as setting up rights for pregnant workers.[22] In fact, in a working context it often happens that a woman is discriminated on the ground of her pregnancy, not on the grounds of sex. This occurs because women's role as primary carers is seen as opposed to their role as workers; employers are thereby reluctant to employ women in their reproductive years because of their expectations concerning the link between the social and biological function of reproduction[23]. Consequently, it is possible to observe that despite a symbolic commitment to the elimination of these structural barriers, the EU Institutions were intended to protect women's social function as primary carers and as mothers.

In relation to the extent of the intervention of EU Equality law in private relationships it is possible to find some developments. In comparison with the Equal Pay directive analysed previously, this Equal Treatment directive attests a slow but noticeable political trend for what concerns the role of EU law as a transformative tool. In fact, while the first Directive approached the principle of equal treatment as a classic and technocratic EU law obligation, the second one,

[21] R. Guerrina, *Mothering the Union – Gender Politics in the EU*, Manchester- New York, Manchester University Press, 2005, p. 49.
[22] Ivi, p.50.
[23] Ibidem.

adopted just one year later, had a more transformative tone, giving evidence also of the "transformative function" of EU Equality law. [24] This additional function is the result of a strong involvement of the Court of Justice and of intense interactions between judges and the legislator. Although it coexists and is complementary to the infrastructural one, it seeks to regulate private relations and is therefore designed to transform society from the inside. For this purpose, the choice of words made by the legislator within the Equal Treatment directive was essential. In fact, by declaring that the EU seeks to "put into effect" the principle of Equal Treatment in the Member States and that there shall be "no discrimination whatsoever" on the ground of sex in employment, going beyond the narrow issue of pay, the intention to reach beyond the level of the Member States and within societies became more evident.

Moving from the approach of the Equal Treatment Directive, EU sex equality legislation expanded its scope, for instance covering self-employed persons through the adoption of a new directive on this matter[25].

Other improvements regarding above all pregnant workers' rights were made with the Directive 2002/73/EC which, adopted by the Council and the European Parliament under the co-decision procedure[26], amended directive 76/207/EEC. In particular, due to this revision, a definition of direct and indirect discrimination was given[27]: it is considered as direct discrimination a situation in which *"*one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation" and as indirect discrimination when "an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless

[24] E. Miur, *The Transformative Function of EU Equality Law*, in "European Review of Private Law", 21, 2013, n.5/6, pp.1233- 1239.

[25] For a complete analysis of this directive see paragraph 1.4.

[26] It is important to underline that in the framework of EU decision-making procedure, this directive had been adopted after a Conciliation Committee between the Parliament and the Council. In fact, not having reached a common position on the Commission's legislative proposal, a Conciliation Agreement had been set. Therefore, the Parliament, voting by an absolute majority, and the Council, acting by a qualified majority have approved the final text.

[27] In reality, the concepts of direct and indirect discrimination, initially elaborated by the European Court of Justice, were clarified for the first time with the Directive 2000/43/EC implementing the principle of equal treatment between person irrespective of racial and ethnic origin and the Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. Therefore, it has been considered appropriate inserting these definitions also in the Directive on Equal Treatment.

that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary" (Article 2, paragraph 2).[28]

Concerning the protection of women, particularly as regards pregnancy and maternity, the directive established the entitlement for women on maternity leave "to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence" (Article 2, paragraph 7), providing in this way to introduce some concrete measures.[29]

In the case of discrimination and a subsequent loss and damage, the directive provides that Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation, in order to guarantee the effectiveness and availability of judicial procedure to all persons who consider themselves damaged by a violation of the principle of equal treatment. [30]

To conclude, the directive acknowledged the legitimacy of special measures[31] that can be taken to promote the social dialogue between the social partners with the aim of fostering equal treatment, as well as measures taken in cooperation with employees' representatives, in order to improve those situations where the statistics have shown bad proportions of men and women at different level.

[28] The full text of the directive 2002/73/EC is available on: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:269:0015:0020:EN:PDF

[29] Despite that, the responsibility to protect working women and men against dismissal due to exercising those rights, is directed to Member States.

[30] Article 6, paragraph 2.

[31] Such as monitoring workplaces practices, codes of conduct, research or exchange of experiences and good practices. (Art. 8b)

## 4. The acknowledgement of self-employed workers in EU secondary law: the directives 86/613 and 2010/41

The adoption of a new directive on Equal Treatment was aimed at extending the scope of equal treatment, already declared in directive 76/207[32], to men and women engaged in an activity in a self-employed capacity[33] and to their spouses, not being employees or partners.

Directive 86/613, whose title is "Directive on the implementation of the principle of equal treatment between men and women engaged in an activity, including agriculture , in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood", was formally adopted by the Council which, acting unanimously[34], achieved an important piece of legislation. First of all, it recognized the areas in which women are more susceptible to discrimination[35] and it tried, therefore, to bridge the public-private division present in the official labour market. In this way it diversified itself from the other directives analysed so far, which did not consider the link between the public and private.

[32] The directive tried also to extend the contents of Equal Treatment in Social security Directive (1979/7/EEC) and the Equal Treatment in Occupational Social Security Schemes Directive (86/378/EEC) which, together with the 86/613 Directive, were expected to complete the work of the 1976 Equal Treatment Directive.
The Equal Treatment in Social Security Directive (1979/7/EEC) intended to: implement the principle of equal treatment for men and women in the field of social security (art. 1); define the schemes targeted by this policy as sickness, invalidity, old age, accidents at work and occupational diseases, unemployment (art. 3). It consented derogations to the principle of equality, one of which recognized the possible impact of pregnancy upon the implementation of the principle of equal treatment (art.4).
The Equal Treatment in Occupational Social Security Schemes Directive (86/378/EEC) clarified some points of the article 119 of the Treaty of Rome and defined the scope and the ways of applying the principle of equal treatment for men and women in occupational social security schemes. In addition, due to the Barber judgment implied that pensions under private company schemes must be paid to men and women at the same age.
[33] Defined by article 2 as 'all persons pursuing a gainful activity for their own account, under the conditions laid down by national law, including farmers and members of the liberal professions'.
[34] The directive was based on articles 100 and 235 of the Treaty of Rome which order that the Council, acting unanimously: shall issue directives for the approximation of those provisions laid down by law that directly affect the establishment of a common market; shall take the appropriate measures when the Treaty has not provided the necessary powers to attain one of the objectives of the Community.
[35] Which are those furthest away from State control.

Concerning self-employed persons, Member states were requested to take the necessary measures to ensure the elimination of all provisions which are contrary to the principle of equal treatment, especially in respect of the establishment, equipment or extension of a business or of any other form of self-employed activity including financial facility[36]. Moreover, in cases where a contributory social security system for self-employed persons exists in a Member State, that Member State should, taking all the necessary measures, enable the spouses to join a contributory social security scheme voluntarily.[37]

Secondly, the directive institutionalized, in the case of interruption of the occupational activity necessitated by pregnancy or motherhood, the entitlement for female self-employed workers and wives of self-employed men to cash benefits under a social security scheme or under any other public social protection system. By providing these forms of financial protection during and after pregnancy, it overcame the limitations of the 1976 directive.[38]

Although this directive officially recognized the rights of self-employed workers and moreover established the standard for equality in Europe, it is probably, on the whole, the weakest policy adopted by the EU for the protection of women's employment rights[39]. In contains, *de facto*, soft obligations for Member States. For instance, given that spouses of self-employed persons lacked of any professional status, Member States were merely requested to examine under what conditions the recognition of the work of those spouses may be encouraged and to consider any appropriate steps for encouraging such recognition[40].

Some of the limitations of this directive are partially overcome with the recent 2010/41 Directive that, adopted by the Council and the European Parliament under the co-decision procedure, repeals the 86/613 one. It contributes to implementing to a greater extent than before the principle of equal treatment

[36] Article 4.
[37] Article 6.
[38] The 1976 Directive, already analysed in paragraph 1.3, did not allow in fact any form of economic compensation, but issued only the need of protection for pregnant workers.
[39] R. Guerrina, *Mothering the Union – Gender Politics in the EU*, Manchester- New York, Manchester University Press, 2005, pp.52-53.
[40] S. Burri e S. Prechal, *EU Gender Equality Law, Update 2013*, European Network of legal experts in the field of gender equality, p.13. The document is available on the website: http://ec.europa.eu/justice/genderequality/files/your_rights/eu_gender_equality_law_update2013_en.pdf

between men and women engaged in an activity in a self-employed capacity[41]. Firstly, it addresses not only the situation of self-employed persons and their spouses, but also their life partners, when they are recognized by national law and if they participate in the activities of the self-employed worker and perform the same tasks. Nevertheless, the directive states that life partners must not be employees or business partners. [42] This is one of the developments established by this directive.

Secondly, provisions in the field of maternity benefits are contained in article 8. The most innovative support, compared with the previous directive considered, is that female self-employed workers, spouses and life partners, in accordance with national law, shall be granted a sufficient maternity allowance: it allows for interruptions to their occupational activity due to pregnancy or motherhood for at least 14 weeks. [43]

In the matter of social protection, the repealing directive issued that, where a system for social protection for self-employed workers exists in a Member State, that Member State should take the necessary measures to ensure that spouses and life partners can benefit from social protection in accordance with national law (Article 7, paragraph 1). It represents an improvement compared to 86/613 directive, but it is still a weak provision, for the reason that Member States may decide whether the social protection is implemented on a mandatory or voluntary basis (Article 7, paragraph 2). Furthermore, Member States are enabled to adopt positive actions aimed at ensuring full equality between men and women in working life (Article 5), for example by promoting business creations by women.

These changes considerably improve the protection of female self-employed workers and spouses or life partners of such workers who help with their business. At EU level, it is the first time that a maternity allowance has been granted to self-employment workers. Therefore, considering that around 15% of working people

[41] It is important to stress that, in the meanwhile, important treaties have been ratified and other directives have been adopted, such as the Pregnant Workers Directive and the Recast Directive, the Treaty of Amsterdam and the Charter of Nice. They certainly made a strong contribution in this field and in repealing the 86/613 directive.
For a complete analysis of them see the following paragraphs.

[42] Article 2.

[43] This financial support is deemed to be sufficient if it guarantees an income at least equivalent to the allowance which a person would receive in case of a break in her activities connected with her state of health or equivalent to any other family related benefit.

in Europe are currently self-employed[44], all these improvements can be considered a significant result.

## 5. The Single European Act

Following the adoption of relevant directives on the issue of equality of pay and equality of treatment, in the 1980s a new issue started to emerge: the importance of health and safety at work of women and men. Up to that time, the Treaties did not confer important competences regarding these matters on the Communities; only in the Euratom Treaty chapter 3 of Title 2 was devoted to lay down basic standards for the protection of the health of workers.[45]

With the entry into force of the Single European Act in 1987, signed in Luxembourg one year before, the competence of the Community in relation to health and safety for workers was clearly affirmed even if, in reality, the SEA was intended to give a new impulse to the process of European Construction so as to complete the internal market[46].

The Single European Act declared the national sovereignty of Member States over "rights and interests of employed persons", involving that, in the case of Community decisions which regard labour law, the unanimous vote by the Council would be required and, therefore, each member state would have the right to veto those proposals from the Commission[47]. In this context, it was difficult to

[44] According to the fifth European Working Conditions Surveys (EWCS). Figures taken from the website:
http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/selfemployedperson.htm

[45] "Basic standards for the protection of the health of workers and of the general public from the dangers arising from ionizing radiation shall be established within the Community. The term "basic standards" shall mean:
(a) the maximum doses compatible with adequate safety;
(b) the maximum permissible degree of exposure and contamination; and
(c) the fundamental principles governing the medical supervision of workers." Article 30 of the Euratom Treaty:

[46] It is important to remember that the Single European Act came after the "Spinelli" Treaty, a project Treaty that would have imply a qualitative leap for the EU integration. Nevertheless, this treaty never came into force, as it was not ratified by some Member States, but the Single European Act represented a "timid substitute".

[47] R. Blanpain, *European Labour Law*, Kluwer Law International, 2008, p.209.

declare that such decisions as well social policies in general were as important as economic and monetary issues.

Reference to new competences added to Community was made in the new article 118A, retained in the former Article 137 TEC and now in article 153 TFEU, according to which the Community shall support and complement the activities of the Member States[48] in the field of the working environment to protect workers' health and safety[49]. In order to exercise these competences, current article 153 TFEU as amended by the Treaty of Lisbon, allows instead at paragraph 2(b), that the Council and the European Parliament adopt, with qualified majority, directives providing for minimum requirements for the improvement of the working environment[50] and for equality between men and women with regard to labour market opportunities and treatment at work[51]. The list of such fields had been

[48] This is a clear reference to the subsidiarity principle. This rule has, in fact, to be read together with article 4, paragraph 2 TFEU, that arranges that EU has shared competence with Member States in the field of social policy, and with article 5, paragraph 3 TFEU, according to which EU may take initiatives to ensure coordination of Member States' social policies. This means that EU has the competence to adopt legal acts in the mentioned field, as well to define modalities of coordination of Member States' social policies, without substituting for the Member States.
On this issue see: Comment on Article 153, in *Trattati dell'Unione Europea,* a cura di A.Tizzano, Giuffrè, Milano, 2014, p.1442.

[49] In this context, the terms "safety" and "health" are complementary. They both aim at not only preventing damages, but also promoting in a positive way the health and safety of the employees. Consequently, article 137 intends not only eliminate risks but also to establish those measures which promote them in a positive way.
Ivi, p. 625.

[50] Article 118a had been, in fact, the legal base of the framework directive of 12 June 1989 concerning measures to encourage the health and safety of workers at work. It contained a number of minimum requirements and general principles relating to the prevention of industrial risks, vocational training, information, consultation and participation of workers and should looked upon as the basis for a number of specific directives relating to the workplace.

[51] *"The European Parliament and the Council may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States."* Article 153, paragraph 2 (b)
Paragraphs 1 from (a) to (i) include:
*(a) improvement in particular of the working environment to protect workers' health and safety;*
*(b) working conditions;*
*(c) social security and social protection of workers;*
*(d) protection of workers where their employment contract is terminated;*
*(e) the information and consultation of workers;*
*(f) representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5;*
*(g) conditions of employment for third-country nationals legally residing in Union territory;*
*(h) the integration of persons excluded from the labour market, without prejudice to Article 166;*
*(i) equality between men and women with regard to labour market opportunities and treatment at work;*
*(j) the combating of social exclusion;*

gradually defined: while the SEA uniquely considered in article 118A the improvement of the working environment for the protection of workers' health and safety, the Treaty of Amsterdam and Nice have declared other domains[52]. This development constitutes an effective increase in the decision-making powers for the Community[53]. Nevertheless, several interpretation difficulties related to this article took place, even more in the case the directives involved can be adopted by a qualified majority in the Council and consequently no States enjoys a right of veto. For these difficulties the Court has obviously played a decisive role, and declared that article 153 TFEU confers upon the Community internal legislative competences in the area of social policy and gives a broad mandate to the EU to proceed in this area. [54]

Nonetheless, in domains that concern: the social security and protection of workers; the protection of workers where their employment contract is terminated; the representation and collective defense of the interests of workers and employers, including codetermination; conditions of employment for third-country nationals legally residing in Union territory[55] the special legislative procedure applies. Therefore, the Council, after having consulted the European

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*(k) the modernisation of social protection systems without prejudice to point (c).*

[52] Comment on Article 153, in *Trattati dell'Unione Europea*, a cura di A.Tizzano, Collana "Le fonti di diritto italiano", Giuffrè, Milano, 2014, p.1441.

[53] In truth Article 118A was the direct result of a compromise: given that The Commission's proposal of the Single European Market Programme in 1985 implied the approval of a large number of directives aimed at eliminating the many obstacles identified, to achieve this outcome the Single European Act derogated from the requirement of unanimity laid down in the then Article 100 (Article 94 TEC and Article 115 TFEU) by adding to the EC Treaty a new Article 100A EC(Article 95 TEC, Article 114 TFEU) allowing for qualified majority voting. Nevertheless, the British government insisted on inserting a second paragraph into the new Article 100 A EC (Article 95(2) EC), setting that *"Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons".* As part of the negotiation, which led to the exclusion of qualified majority voting from proposals relating to the rights and interests of employed persons, the new mentioned article 118a had been inserted which, on the contrary, allowed for qualified majority voting for proposals encouraging improvements, especially in the working environment, as regards the health and safety of workers.

[54] ECJ, Case C-84/9412, *United Kingdom v. Council,* November 1996, ECR 1996, 5755.
In the *UK v. Council of the European Union* the UK tried to obtain the annulment of the directive on the organization of working time (1993), because in its opinion it was illegal as it was based on Article 137 of the Treaty which allowed for qualified majority. According to the UK, this article had to be strictly interpreted and such directive should have been based on other articles of the Treaty, which on the contrary require unanimity in the Council of Ministers.

[55] Fields specified in article 153 TFEU, paragraph 1 (c), (d), (f) and (g).

Parliament, the Committee of Regions and the European Economic and Social Committee, shall act unanimously.

Such directives providing for minimum requirements should avoid imposing administrative, financial and legal constraints in a way which would prevent the creation and development of small and medium-sized enterprises. Furthermore, Member States will not be precluded from maintaining or introducing more stringent measures for the protection of working conditions compatible with the Treaty.

The considered articles allow at paragraph 2(a) the adoption of measures in order to encourage cooperation among Member States. Those measures concern initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences and represent a tool designed to realize a spontaneous convergence among Member States legislations.[56]

Moreover, both means of action allowed by paragraph 2 shall not affect the right of Member States to define the fundamental principles of their social security systems as well as not preventing any Member States from maintaining or introducing more protective measures compatible with the Treaties (Par. 4). Hence, social security has been confirmed as a particularly sensitive issue for Member States.

[56] One of these measures is the Open Method of Coordination. It refers to a spontaneous and mutual exchange among Member States following the formulation of common purposes and indicators . For this method, non-legally binding acts are adopted in order to make Member States advancing towards an upper-level integration and harmonization.

# 6. The Maastricht Treaty and the Agreement on Social Policy

## *6.1 New tasks and competences in the social field*

The Treaty of Maastricht (formally Treaty on European Union or TEU), signed on 7 February 1992 and come into force on 1 November 1993, permitted the development of a real social dimension in the European Union. With this Treaty, the Community clearly went beyond its original economic objective, and more direct links between social law and economic growth could be discovered: this occurred because current day circumstances differ from those prevailing in the 1970s and social law is facing more complex challenges than those exclusively linked to economic objectives.

This further ambition was firstly dealt by Title VI of the Treaty that is structured around the close interdependence of political economy and social regulations, and it attests in this way this new propensity. Besides, among new tasks enshrined by article 2 of the Treaty, gains relevance the promotion of harmonious and balanced development partly fulfilled through means related to social law.[57]

In addition, the Treaty includes a Protocol on Social Policy which forms part of the Treaty and an Agreement also on social policy, annexed to the Protocol, between eleven Member States, with the exception of the UK which benefited from an opt-out. Given that the same eleven Member States adopted in 1989 the Community Charter of the Fundamental Social Rights of Workers[58], it had been stressed that the Agreement represents their intention to continue along the path laid down by the Charter.

The Agreement issued a great expansion of Community's legal competences in the field of social policy, by laying down in article 1 objectives related to the EU

[57] S. Sciarra, *Social Values and the Multiple Sources of European Social Law*, in "European Law Journal", Vol. 1, No. 1, 1995, p.60-83.

[58] The Charter of Fundamental Social Rights of Workers establishes, in the first title, the basic social rights for workers that are founded upon the firm in order to promote both the standard of living on and social consensus. The Charter is based on article 151 TFEU (former article 136 TEC) under the terms of which the Member States have agreed on the need to promote improved living and working conditions for workers so as to make their harmonization possible while maintaining their improvement.

social dimension.[59] The agreement redrafted also article 118A of the Treaty of Rome, declaring that within this new sphere of competence the Council is authorized to adopt, by means of directives and proceeding by qualified majority voting, minimum requirements for gradual implementation in fields linked to health and safety of workers, working conditions and equal treatment between men and women (Article 2, paragraphs 1 and 2); in other five areas like social security, protection of workers where their employment is terminated, unanimity will be instead required (Article 2, paragraph 3)[60]. The Agreement specifies also in paragraph 6, article 2 those areas in which such provisions do not apply, which are pay, the right of association, the right to strike and the right to impose lock-outs. [61]

The inclusion of these provisions surely attests the intention of expanding both the legal scope and the ability of the Community to develop a social policy and labour law at European level. Certainly, this new and more complex formulation of competence and the apparent overlap between fields allowing for qualified majority voting, unanimity or those areas completely excluded, will give rise to much debate when measures are proposed by the Commission.

## *6.2 The acknowledgement of collective bargaining within the Maastricht Treaty*

Apart from wider Treaty competences, another significant innovation of the Maastricht deal in the social policy field concerns the inclusion of collective agreements among the instruments of Community action. The agreement of social

[59] "The Community and the Member States shall have as their objectives the promotion of employment, improving living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion." Article 1 of the Agreement, the re-drafted article 117 of the Treaty of Rome.

[60] It must be stressed that, as pointed out in paragraph 1.12, the Maastricht Treaty introduced the co-decision procedure. It gives the European Parliament the power to adopt instruments jointly with the Council of the European Union. Therefore, it becomes co-legislator, except for those cases where the procedures regarding consultation and approval apply.

[61] Cfr. B. Bercusson, *Maastricht: a fundamental change in European Labour Law* in "Industrial Relations Journal", Vol. 23, No. 3, 1992, pp. 177-190.

policy establishes, in fact, "the possibility for Member States to entrust management and labour, at their joint request, with the implementation of directives. In that case, no later than the date on which a directive must be transposed, […] management and labour have introduced the necessary measures by agreements, the Member States concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive (Article 2, paragraph 4).

It is promptly possible to note that, as usual, it is nonobligatory for Member States to entrust implementation to social partners. Rather, given that Member States cannot force social partners to implement directives but it must be at their joint request, an appropriate level of collective bargaining is presumed for this type of implementation. [62]

According to Article 3 of the Agreement, the Commission has the responsibility to consult labour and management, so that actions taken in breach of such provisions should be sent back to the social partners for evaluation: this imply that when adopted without consultations, such actions will be invalid. Nevertheless, the Agreement points out that the consultative procedure can only apply to the matters referred to in Article 2 of the Agreement and not to social policies under Article 118a of the Treaty of Rome, excluding in this way matters in the field of social security of workers.

The legal status of collective agreements is clarified in the successive article: article 4 indicates that if the signatory parties so request, the collective agreement can be implemented by a Council Decision. In truth, a Communication[63] presented by the Commission to the Council and to the European Parliament clarifies some aspects of it, specifying that the Council should not amend the contents of such collective agreements[64]. Under these circumstances, the implementation of collective agreements through Council decisions seems a reliable solution for the enforceability of these rights. An agreement concluded

[62] Ivi, p.183.

[63] "Communication concerning the application of the Agreement on Social Policy", presented to the Council and to the European Parliament, COM (93) 600, final, 14 December 1993.

[64] This principle was included in the proposal put forward by the European Trade Union Confederation and the Employers' Association from which the Maastricht reformers drew inspiration, but it was not inserted in the Social Chapter. Consequently, it now forms part of social soft law.

within Community competences and implemented by a Council decision, will acquire a stronger position in the hierarchy of European norms.

A second method to implement Community level agreements at Member State level is disposed by article 2, paragraph 4 of the Agreement that demands that they shall be implemented in accordance with procedures and practices specific to management and labour of each Member State. According to that, a Member State could be obliged to develop procedures and practices to implement such agreements and it could be required some formal machinery of articulation of national standards with those laid down in the agreement.

Another possibility is that, already existing machinery of articulation of national standards will be used; therefore, Member States are not obliged to develop new procedures and practices to implement the agreement.

A last possibility requires that Member States are not obliged to create mechanisms of articulation of Community agreements, but national laws may not interfere with such mechanisms which already exist, or which may be created by social partners within the member state in order to deal with the new development at Community level.

For collective agreements on matters falling outside Community competence, they could legitimately be labeled as European due to the initiative taken by European associations and their broad impact across European countries, but no direct legal effect will arise from them within national legal systems.

The acknowledgement of collective bargaining, which is comparable to well-established models tested in member countries, is related to three major impulses:

firstly, the role of Commission in promoting social dialogue. The Commission has, in fact, a very dynamic task due to its role of initiator and animator at European level; then it has the important function of facilitating the dialogue between management and labour at community level by ensuring balanced support for the parties. One of the earliest example of reinforcement of social partners is the ETUC/UNICE/CEEP accord, that proposed to replace the existing article 118b of the Treaty of Rome, which was then approved at the Maastricht summit becoming article 3, paragraph 1of the Agreement appended to the Union Treaty.

Secondly, another impetus derives from the consultation of social partners in the formulation of EC labour law. In fact, as article 154 TFEU points out, the consultation occurs at two stages: before submitting proposals in the social field, the Commission must consult management and labour on the possible direction of Community action; if after consultation, the Commission considers Community action appropriate, it shall consult management and labour on the envisaged proposal. They can formulate their own opinion or a joint recommendation, which the Commission is free to include or not.[65]

For what regard the timing of the consultation, this is the issue that arises major ambiguities. The mentioned article declares that the duration of the procedure shall not exceed nine months since it is initiated by the social partners. Doubts are related to the point of such consultation, if it occurs during the first stage, that is before the Commission produces its envisaged proposal, or at a second stage, that is once the Commission has already produced its planned proposal. Experience from many countries demonstrates that, in the first case, it will be pressures on social partners to negotiate and avoid an imposed standard which can maybe bring to a less desirable result. In the second circumstance instead, parties may be more or less satisfied with the proposal. If less, social partners will have an incentive to negotiate and agree at a different standard, that usually content also the already satisfied party. In this context, experience in many countries demonstrates that at this step, social partners are often able and willing to negotiate derogations from specific standards, in order to get more flexibility and advantages for both sides. [66]

To the third impulse are related the previous ones, that is the subsidiarity principle, established as general rule by article 3b of the Treaty of Maastricht, which clarifies that in areas that are not within its exclusive powers the Community shall only take action where objectives can be best pursued by action at Community rather than at national level.[67]

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[65] R. Blanpain, *European Labour Law*, Kluwer Law International, 2008, pp.165-166.

[66] B. Bercusson, *Maastricht: a fundamental change in European Labour Law* in "Industrial Relations Journal", Vol. 23, No. 3, 1992, p.185.

[67] "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be

Nevertheless, the application of this principle becomes more complex when actions at Community level involved not only EC institutions, but social partners too. Generally, the principle is used to Community action against Member State action. In other circumstances, it could imply interactions between EU level action taken by social partners and Member States action; or EU Commission action versus social partners within Member State action; or EU level action taken by social partners versus social partners action within Member State.
In all these cases, the same standard and logic as the subsidiarity principle apply, even if neither of these choices seems directly governed by it.[68]

## 7. The Pregnant Workers Directive (92/85)

Taking under consideration the legislative scenario provided by the Single European Act and the Treaty of Maastricht, the 92/85 Directive has represented the way to confer some employment entitlements in favour of mothers, pregnant and breastfeeding women for what concern both their safety at work and maternity rights. Being based on the considered article 118A and following the cooperation procedure, the Council acting by a qualified majority[69] intended to implement measures to encourage improvements in the health at work of this specific category of workers.[70] In fact, after having given a definition of them,[71]

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better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty." (Article 3b of the Treaty of Maastricht)

[68] B. Bercusson, *Maastricht: a fundamental change in European Labour Law* in "Industrial Relations Journal", Vol. 23, No. 3, 1992, p. 184.

[69] In truth, the directive was based also on article 149 of the Treaty of Rome. It established that for an act constituting an amendment to the proposal of commission, unanimity shall be required.

[70] In explaining its purpose, the directive refers also to the 89/391/EEC Directive, that concerns the introduction of measures to encourage improvements in the safety and health of workers at work. In particular, article 16 states that the Council, acting from a proposal of the Commission shall adopt individual Directives.

[71] Article 2.
a) Pregnant worker shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice;
b) worker who has recently given birth shall mean a worker who has recently given birth within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice;

he focused on their working conditions, in particular for what concern health protection, hygiene and safety. Guidelines, estimating the elements considered hazardous for the safety and health of these workers[72] are defined by the Commission, in consultation with Member States and assisted by the Advisory Committee on Safety, Hygiene and Health Protection at work. Then, Member States should bring these guidelines to the attention of all employers and female workers and their representatives in the respective Member state.

In order to guarantee a state of good health, pregnant and breastfeeding women may under no circumstances be obliged to perform duties for which the assessment has revealed a risk of exposure. Similarly, they are not required to do night work during their pregnancy and for a period following childbirth. To this effect, Member States shall take the necessary measures to entail the possibility to transfer to daytime work or, in case the transfer is not attainable, the authorization of leave from work or extension of maternity[73].

The most interesting provisions for the analysis conducted so far, are those that regard maternity leave, prohibition of dismissal and employment rights. In the matter of maternity leave the directive introduced a *minimum* of 14 weeks, that must include a compulsory one of at least two weeks. Both should be allocated before and /or after confinement[74]. In addition, during this period the dismissal of pregnant workers, workers who are breastfeeding and workers who have recently given birth, shall be prohibited and they are entitled to the payment of and/or entitlement to an adequate allowance[75]. In the event that workers consider themselves wronged by failure to comply with the obligation arising from this directive, they could pursue their claims by judicial process or by recourse to other competent authorities[76].

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c) worker who is breastfeeding shall mean a worker who is breastfeeding within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice.

[72] For instance chemical, physical and biological agents, industrial processes but also mental and physical fatigue that are considered a risk for the health of female pregnant workers.

[73] Articles 6 and 7.

[74] Article 8, paragraph 1 and 2.

[75] The allowance is considered adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities for reasons linked to their state of health.

[76] Article 12.

This directive has often been interpreted jointly with the provisions of directive 76/207 on equal treatment between men and women in employment. In fact, according to the European Court of Justice, discrimination on grounds of pregnancy amounts to direct discrimination.[77]

Recently, the EU Commission has proposed to increase the maternity leave to 18 weeks[78]. While the EU Parliament is in favour of maternity leave of at least 20 weeks, fully paid, the EU Council has not yet reached a decision on these proposals.[79] The proposal seems not entirely problematic as many Member States already provide longer periods of leave, although this is often coupled with parental leave. What has been more criticized is instead the full payment of leave, (despite supported by the European Economic and Social Committee), due to the increased costs that business and/or governments should incur.

## 8. The adoption of gender mainstreaming and the Treaty of Amsterdam

The Treaty of Amsterdam[80] represented an important step forward a wider achievement of gender equality. In fact, if up to this point EU legislation on gender issues have concerned the field of employment, thanks to the ratification of this Treaty a new approach was pursued and even inserted within the scope of

[77] ECJ, Case C-177/88, *Elizabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen*,8 November 1990, ECR 1990, I-3941. It is available at: http://eur-lex.europa.eu/resource.html?uri=cellar:61a79cb0-7c8e-4507-977c-bbbc20cf4c47.0002.03/DOC_1&format=PDF

[78] Proposal for a Directive of the European Parliament and of the Council, amending Council directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, COM (2008) 600/4; the document is available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=402

[79] S. Burri e S. Prechal, *EU Gender Equality Law, Update 2013*, European Network of legal experts in the field of gender equality, p. 14-15.

[80] The Treaty of Amsterdam was approved by the European Council held in Amsterdam on 16-17 June 1997 and signed on 2 October 1997 by the Foreign Ministers of the 15 EU Member States. On 1 May 1999, it came into force, having been ratified by all the Member States, following their own constitutional rules.

the Treaties. Article 3, paragraph 2 TEC[81] legally introduced in the EU primary law the gender *mainstreaming* concept, that was born in Sweden in the early 90's and received international recognition during the Fourth United Nations World Conference on Women held in Beijing in 1995.[82] During the Beijing Platform gender mainstreaming was defined as a strategy that seeks to ensure that gender considerations, meaning the assessment of implications for men and women, are included in all areas and levels. Specifically, what this strategy points out, is that there is a need to rethink structures and practices that perpetuate inequalities of all kinds, which are not going to be resolved through a focus only on women.[83]
Hereinafter, the same concept was mentioned by EU Commission in 1996 through a Communication[84], which defined it as a principle that "involves mobilizing all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account at the planning stage their possible effect on the respective situation of men and women (gender perspective). This means systematically examining measures and policies and taking into account such possible effect when defining and implementing them". This global strategy, aiming at incorporating a gender perspective in all areas and levels, represents a new tool for the achievement of substantive equality: it calls for the systematic incorporation of gender issues throughout all governmental institutions and policies. So defined, on one side it assures to bring a gender dimension into all EU policies, but on the other side it requires, for the correct implementation, that all central actors in the policy process adopt a gender perspective. [85]

[81] Article 3, Paragraph 2 recites, in fact :"in all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women".
[82] R. Quesada, *The shaping of the principle of equality and non-discrimination in Europe* in R.Quesada, R.Bortone, S. Peràn, *Gender Equality in the European Union. Comparative study of Spain and Italy*, Aranzadi, 2012, p.37.
[83] Cfr. *Advancement of Women Gender Mainstreaming. An overview*, Office of the Special Adviser On Gender Issues and Advancement of Women, United Nations, New York 2002, p. 9.
See: http://www.un.org/womenwatch/osagi/pdf/e65237.pdf
[84]EU Commission Communication on "Incorporating Equal Opportunities for Men and Women into all Community Policies and Activities" available at:
http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:51996DC0067&from=EN
[85] Cfr. M. A. Pollack, E. Hafner-Burton, *Mainstreaming Gender in the European Union* in "Harvard Jean Monnet Working Paper 2/00" , Harvard Law School – Cambridge, MA 0238, available at:www.jeanmonnetprogram.org

However, the inclusion of this approach was not the sole novelty of the Amsterdam treaty. First of all, gender equality was expressly included in article 2[86] as one of the tasks, and article 3[87] defines it as one of the activities of the Community. Major changes were introduced with regard to social policy too, in particular, some important aspects of social law were incorporated into primary law for the first time in the history of the European Union.

Primarily, article 141 TEC (ex article 119 of the Treaty of Rome, already analyzed in paragraph 1.1) was subject to amendment, in order to include some provisions of the Social Policy Protocol and some developments in case law and secondary legislation. The article now contains the concept of 'equal pay for work of equal value', which was first developed by the European Court of Justice and then was expressed in the Directive on Equal Pay. In addition, the new paragraph 3 focused on the role of the Council which, following the co-decision procedure and after consulting the Economic and Social Committee, may adopt measures to ensure the application of the principle of equality between men and women in the field of employment, including the principle of equal pay. An additional paragraph 4 allows instead Member States to adopt or maintain positive measures in order to facilitate the exercise of professional activities for the underrepresented sex or to avoid or compensate disadvantages in their professional careers.[88]

Secondly, in article 13 TEC special attention is paid to the issue of discrimination. All forms of discrimination (sex, race or ethnic origin, religion or belief, disability, age or sexual orientation) are prohibited. For this purpose the Council, acting by unanimity and after consulting the European Parliament, can adopt actions to combat them. [89]

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[86] "The Community shall have as its task […]a high level of employment and of social protection, equality between men and women […]."

[87]"In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women".

[88] G.V. Arribas, L. Carrasco *Gender Equality and the EU. An Assessment of the Current Issues*, in Eipascope 2003/1, p. 23; the document is available at: http://aei.pitt.edu/834/1/scop2003_1_3.pdf

[89] Article 13 has represented the basis for two important directives: the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and the Council Directive 2000/78/EC of 27 November 2000 establishing a framework for equal treatment in employment and occupation. Both of them are greatly influenced by the Directive on equal treatment between men and women and, at the same time, their contents influenced the amendment of Equal treatment Directive in 2002, in which revisions are in line with the article cited above.

## 9. The Recast Directive 2006/54/EC

The adoption of the 2006/54/EC Recast Directive was aimed at creating a single text in the matter of gender issues, in which some existing provisions of different sex equality directives are brought together and some cases law of the Court of Justice of the EU are incorporated. The decision to modernize as well simplify Community Equality law in order to produce an incremental change, was first declared by a Communication from the Commission in 2003[90]. The tool chosen in order to pursue this aim was the Recast technique[91] that, according to Helsinki European Council conclusions of December 1999, is "an improved codification procedure", being the opportunity on one side to reshape existing law and on the other side to incorporate in a new legal act both substantive amendments and unchanged provisions of that act[92].

Nevertheless, directives incorporated are only some of those ones that operate in the field of employment and vocational training. [93] One of the shortcomings of the Recast one is, in fact, that it does not incorporate the relevant employment provisions of the Pregnant Workers Directive as well those ones of directive on equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity[94]. This omissions could demonstrate that in the framework of Community gender equality law such provisions have been seen as an exception to the principle of equal treatment and as a matter to be dealt

[90] COM(2003) 71 final 11.2.2003, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions updating and simplifying the Community *acquis.*

[91] The term Recast as a term of legal art appears to originate in the 1994 Interistitutional Agreement on the Accelerated working method for official codification of legislative texts. In that Agreement, the institutions agree that where it is necessary to make substantive changes , the Commission may choose to recast its proposal or submit a separate proposal for amendment and then, once the substantive changes has been adopted, incorporate it into the proposal for codification.

[92] N.Burrows, M.Robinson, *An Assessment of the Recast of Community Equality Laws*, in "European Law Journal", Vol.13, No.2, 2007, p.186-203.

[93] It incorporated the Directive 75/117; the Directive 76/207, as amended by the Directive 2002/73; Directive 86/378 as amended by Directive 96/97 and 97/80.

[94] This occurred despite the fact that, with regard to the Pregnant Workers Directive, the European Court of Justice has ruled that unfavourable treatment on the ground of pregnancy is discrimination on the ground of gender, and with regard to the directive on women engaged in an activity in a self-employed capacity, the European Economic and Social Committee in giving its opinion sought by the Council on the proposal, stated that it was particularly weak in content, providing insufficient protection for women.

with special and separate rules. More specifically, there are several legal, practical and political reasons why the scope of the Recast directive is limited. One of these is the most obvious in accordance with the Community law's point of view and is related to the legal basis of the Recast. Its legal base is article 141 TCE ( today article 157 TFEU) that allows that specific measures relating to equal treatment for men and women in employment matters could be adopted by the European Parliament and the Council, following the co-decision procedure. Differently, to include in the recast those issues of health and safety, such as pregnant workers' rights and social security rights, the directive should be based on article 137, which gives precedence to the social partners in negotiating framework agreements, and only in case of failure to agree the Commission can move to the co-decision procedure.[95]

For what concerns the strengths of this directives, one of the most interesting aspects is the title. The official name is "Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation" that reflects an added emphasis on the principle of equal opportunities.

## *9.1 Direct and Indirect discriminations*

The Recast Directive itself is divided into four titles. The first title, after illustrating its purposes, gives the definitions of direct and indirect discrimination. In reality, these definitions are similar to those contained in the 2002/73/EC directive[96]. For what concerns direct discrimination, the denotation given in article 2, paragraph 1(a) is approximately the same[97] and it suggests that "when a person

[95] N.Burrows, M.Robinson, *An Assessment of the Recast of Community Equality Laws*, in "European Law Journal", Vol.13, No.2, 2007, p.196.

[96] In truth, the first definition of direct and indirect discrimination has been provided in the 'Race Directive (2000/43) and the Framework Directive (2000/78). The same definition was then recalled by the 2002/73/EC directive.

[97] "Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1." (Article 2, paragraph 2 of the Equal Treatment directive 2002/73/ec)

is treated less favorably should be compared to another person who is in a comparable situation".

According to the European Court of Justice, there is discrimination because a person has been put at a disadvantage for the reason of being female or male, without engaging in comparison of the situations. Thus happens because national courts do not always raise the issue of comparison[98]. Anyways, when the national courts put this issue to the European Court of Justice, this one will deal with comparisons[99].

Other cases of discrimination may occur, as article 2, paragraph 2 (c) of the Recast Directive states, "for any less favourable treatment of a woman related to pregnancy or maternity leave". In this context, the European Court of Justice has often interpreted the prohibition of pregnancy discrimination proactively[100]. In its opinion, the refusal to appoint a woman because she is pregnant amounts to direct sex discrimination, which is prohibited. In the context of application for employment too, if no male apply for the post and a woman is refused due to matters relating to her sex, for example pregnancy, it is always discriminatory[101].

Furthermore, one of the strengths of the recast is that, bringing together the provisions of Equal pay directive and of Equal treatment directive as amended, it may mean that discrimination in pay should be assessed in the same way as less favourable treatment during pregnancy and maternity leave, opening up the possibility of hypothetical comparators in proving pay discrimination.

Regarding indirect discrimination, Article 2, paragraph 1 (b) of the Recast Directive asserts that it applies "where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are

[98] See, for example, in the area of equal pay: Case C-132/92 *Birds Eye Walls.*

[99] S. Burri e S. Prechal, *EU Gender Equality Law, Update 2013*, European Network of legal experts in the field of gender equality, p.17.

[100] A. Masselot, E. Caracciolo Di Torella, S.Burri *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood. The application of EU and national law in practice in 33 European Countries*, European Network of Legal Experts in the Field of Gender Equality, p. 4 Document available at: http://ec.europa.eu/justice/genderequality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final_en.pdf

[101] ECJ, Case C-177/88, *Elisabeth Johanna Pacifica Dekker* v *Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum)Plus*, 8 November 1990, ECR 1990, I-3941.

appropriate and necessary". In these terms, this definition is also substantially analogous to the one provided in the 2002/73/EC directive[102].

One of the main cases of indirect discrimination occurs whether a measure disadvantage significantly more persons of one sex than the other. In this case, the applicant has to prove that a measure or a practice amounts to indirect discrimination. If there is an evidential case of indirect discrimination, the defendant has to provide an objective justification for the indirect discriminatory criterion or practice, that can be accepted if the aim is legitimate and the measures taken are appropriate and necessary.

Nonetheless, the Court has asserted, that mere generalizations do not prove that the aim of the disputed rule is unrelated to any discrimination based on sex: it is necessary instead to attest that the means chosen were suitable for achieving that aim[103]. The Court declared also that, due to budgetary reasons in deciding on social policy and in adopting social protection measures, a Member State cannot justify a difference in treatment between men and women and therefore excuse discrimination against one of the sexes[104].

The European Court of Justice expressed itself, additionally, in a series of cases concerning indirect sex discrimination in relation to part time work.[105] Given that a much lower proportion of women work full time than men, the Court declared that the exclusion of part-time workers from the German pension scheme would be contrary to article 119 of the Treaty of Rome. Nevertheless, is it possible to

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[102] "Indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary." (Article 2, Paragraph 2 of 2002/73 Directive)

[103] S. Burri e S. Prechal, *EU Gender Equality Law, Update 2013*, European Network of legal experts in the field of gender equality, p. 18-19.

[104] Moreover, the ECJ declared also that, to concede that budgetary considerations may justify a difference in treatment between men and women that would otherwise constitute indirect discrimination on grounds of sex, would be to accept as a fundamental a rule of Community law which establishes that equal treatment between men and women might vary in time and place according to the state of the public finances of the Member States.
ECJ, Case C-343/92, *M.A. De Weerd, née Roks, and others v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others*, 24 February 1994, ECR 1994, I-00571, at paragraph 36.

[105] ECJ, Case 170/84, *Bilka-Kaufhaus GmbH* v *Karin Weber von Hartz,* 13 May 1986, ECR 1986, 1607.
In the matter of occupational pension scheme, according to German pension scheme, part-time employees may access to it if they have worked at least 15 years full time over a total period of 20 years.

justify this measure, whenever the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex. In effect, the most recent directives do include this explanation in the definition of indirect discrimination, in order to justify when discrimination does not apply.

## *9.2 Positive actions*

In this framework, the elaboration of the concepts of direct and indirect discrimination represented the acknowledgment of a necessary more substantive approach to equality. To better put it into practice, some specific measures could be adopted.

Positive action exemplify one of these measures, which presently are allowed by EU law, but not yet declared as an EU-law obligation. The recast directive provides a definition of positive action[106], declaring that "member States may maintain or adopt measures within the meaning of Article 141(4) (former article 119 of the Treaty of Rome) TEC with a view to ensuring full equality in practice between men and women in working life". The measures consented under the positive actions are addressed to eliminate the prejudicial effects on women in employment or seeking an employment: it occurs in fact that, owning to the idea of a traditional division of roles in society between men and women, gender inequalities arise. Under these circumstances, measures should encourage the participation of women in various occupations, particularly in those sectors of working life where they are currently unrepresented. Among these measures, quotas in recruitment and promotion are those which allow to achieve this end. However, they must be proportionate to the aim pursued[107].

In the field of positive actions, the European Court of Justice had initially a severe attitude, asserting that a measure that would give automatic and unconditional

[106] Article 3 of the Recast Directive.

[107] S. Burri e S. Prechal, *EU Gender Equality Law, Update 2013*, European Network of legal experts in the field of gender equality, p. 19.

preference to one sex is not justified. In the *Kalanke* case[108], the Court declared that, in the framework of the European Treatment Directive, national measures which give a specific advantage to women are permitted; anyway, the directive does not allow for positive actions, which mandates automatic selection of a woman over a man[109]. In fact, the Court asserted that "national rules which guarantee women absolute and unconditional priority for appointment or promotion, go beyond promoting equal opportunities".

Subsequently, the European Court of Justice softened its position in favour of positive actions. For instance, in the *Lommers* case[110], the Court asserted that measures that gave preference to female employees in the allocation of nursery places, but did not involve a total exclusion of male candidates, were not precluded. This decision stood for a stronger support of positive actions, but in the meanwhile it illustrated its potential danger: in this way, in fact, this judgment perpetuate the view point that childcare is a woman's responsibility, a view which will reduce women's opportunities in the workplace. [111]

## *9.3 The equal treatment of men and women in the Recast Directive. Some exceptions.*

The Recast Directive deals also with the principle of equal treatment of men and women, given that some of its relevant provisions, as remarked before, derive from the Equal Treatment Directive between men and women in employment (76/207 as amended by Directive 2002/73).

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[108] ECJ, Case C-450/93, *Eckhard Kalanke* v *Freie Hansestadt Bremen*, 17 October 1995, ECR 1995, I-3051.

[109] E. F. Hinton *The limits of affirmative action in the European Union: Eckhard Kalanke v. Freie Hansestadt Bremen*, in "Texas Journal of Women and the Law", volume 6, 1997, p.226.
Available at: http://www.law-lib.utoronto.ca/Diana/fulltext/hint.pdf

[110] ECJ, Case C- 476/99, *H. Lommers v Minister van Landbouw Natuurbeheer en Visserij*, 19 March 2002, ECR 2002, I-02891.

[111] B. Mitchell, *Unfair Discrimination or Necessary for Equal Opportunity? The ECJ Upholds Positive Action in Lommers v. Minister Van Landbouw*, Loyola Marymount University and Loyola Law School, 2004.
The document is available at: http://digitalcommons.lmu.edu/ilr/vol26/iss3/6/

Article 14 of Chapter 3 is dedicated to the issue of discrimination. It explicitly forbid direct and indirect discrimination[112] in the public and private sectors, public bodies included.[113]

Nevertheless, the following articles analyze some exceptions permitted to the principle of equal treatment:

- At first, It cannot be considered a discrimination, where a particular occupational activity requires some characteristics related to sex and therefore, such characteristic constitutes a genuine and determining occupational requirement. This is the case, for instance, when an actor in a play or film has to be a man. [114]

According to the European Court of Justice, this derogation must be interpreted strictly. In this context relevant exemplifications were given by its performances in explaining the exceptions of directive 76/207, which are important also for correctly interpreting derogations allowed by the recast directive. So, the court asserted that excluding women from some military units[115] fell within the scope of this exception and, for this reason, did not infringe the directive 76/207. While, the court declared that it is not acceptable the position that the composition of all armed units must remain exclusively male[116]. It found that the derogations provided can only apply to specific activities and a general exclusion was not justified by the specific of the posts in question.

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[112] A Similar provision was given by article 2 of the directive of '76, as already expressed in paragraph 1.3.

[113] This prohibition is referred to:
(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
(c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty;
(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organizations (Article 14 of the Recast Directive).

[114] S. Burri e S. Prechal, *EU Gender Equality Law, Update 2013*, European Network of legal experts in the field of gender equality, p. 9.

[115] ECJ, Case C-273/97, *Angela Maria Sirdar* v *The Army Board and Secretary of State for Defence*, 26 October 1999, ECR 1999, I-07403 (*Sirdar*).

[116] ECJ, Case C-285/98, *Tanja Kreil* v *Bundesrepublik Deutschland*,11 January 2000, ECR 2000, I-69 (*Kreil*).
In this case, German infringed the 76/207 directive by adopting this position.

- Secondly, another exception to the principle of equal treatment regards pregnant women and mothers, in order to guarantee them specific rights, such as maternity leave. Article 28, paragraph 1 of the recast directive[117], in fact, acknowledges the legitimacy of these rights, implicitly admitting the necessity of protecting both a woman's biological condition during and after pregnancy, and the special relationship with her child in the period which follows pregnancy and childbirth. Providing these sorts of protection, the directive aspire to perform substantive equality: this category of women, in effect, cannot be the subject of unfavorable treatment regarding their access to employment or their working conditions.
- The last exception regards positive action. This issue, already raised in the previous paragraph, has always been framed in EU law as an exception to the principle of equal treatment, instead of as an integral part[118].

To sum up, in the case of direct discrimination the Recast Directive allows three derogations to the principle of equal treatment; in the case of indirect discrimination, instead, exceptions are related to other unwritten grounds, which concern the legitimacy of the aim pursued, the pertinence and the necessity of measures to attain that aim. [119]

In conclusion it is possible to affirm that the recast directive, on the whole, reflects and reinforces this conceptual shift away from equal treatment to recognizing the substantial disadvantages that women face in the labour market, such as the difficulty to balance working life and the world of paid employment.

[117] That is exactly the same as article 2, paragraph 3 of the Equal treatment directive 76/207.

[118] In fact, while in the first draft of article 2 of Directive 76/207 positive action was defined as: "The elimination of all discrimination based on sex or on marital or family status, including the adoption of appropriate measures to provide women with equal opportunity in employment, vocational training, promotion and working conditions", at a later stage, during the negotiations on this draft, the reference to appropriate measures was deleted. And, the final text of this article, stipulated that " this Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1)".

[119] S. Burri e S. Prechal, *EU Gender Equality Law, Update 2013*, European Network of legal experts in the field of gender equality, p.11.

Such approach is confirmed also by reference to flexible working as a necessary precondition for equality in the workplace inserted in article 21, paragraph 2.[120]
The reinforcement of all these principle demonstrates a movement towards a more substantive approach as well the need and the willingness to improve the quality of gender discrimination law at the Community level.

## 10. The Charter of Fundamental Rights and the Treaty of Lisbon

### *10.1 Equality provisions in the Nice Charter*

A decisive advancement was performed through the adoption of two important documents: the Charter of Fundamental Rights of the European Union and the Treaty of Lisbon. The Charter first, and the Treaty of Lisbon at a later stage, widen the EU *acquis* in the field of fundamental rights, with a special focus on gender equality.
The Charter of Fundamental Rights, elaborated by a first Convention[121] and proclaimed at Nice on 7 December 2000, brings together in a single document the fundamental rights protected in the EU.
Initially, it did not have any binding legal effect. With the entry into force of the treaty of Lisbon on 1 December 2009, it became obligatory for the institutions of the Union and for Member States, it rank higher than secondary Union law and therefore than directives analyzed so far, forming a body of supreme rules. In this

[120] "Where consistent with national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to promote equality between men and women, and flexible working arrangements, with the aim of facilitating the reconciliation of work and private life, and to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 1 which fall within the scope of collective bargaining. These agreements shall respect the provisions of this Directive and the relevant national implementing measures" Article 21, paragraph 2 of the Recast Directive.
[121] This convention was mandated by the Cologne European Council of 3-4 June 1999.

way, the Nice Charter was granted Treaty status and fundamental rights constitute general principle of the Union's Law.[122]

The Charter affirms the relevance of existing fundamental rights and aims at ensuring greater visibility for them, to strengthen their protection. Among the fundamental rights acknowledged, a single chapter is dedicated to equality and to some rights in the matter of gender equality. In fact, chapter 3 contains the equality provisions, such as the prohibition of discrimination on any ground including sex (article 21); the obligation to ensure equality between men and women in all areas, as well as the admission of the possibility to adopt measures providing for specific advantages in favour of the under-represented sex(article 23).

It is possible to remark that, although the Charter deals with both concepts of inequality and discrimination, the prohibition of inequality represents something wider than the concept of discrimination: in fact, while the non-discrimination could concern not only women, but whatever group and minority, the inequality one applies, instead, to those situations which affect mainly women and, because of prejudices and stereotypes, invades socioeconomic structures. Besides, taking into account that women are one of the two groups of human being and not a minority, this EU principle is not a mere prohibition of discrimination, rather a pro-active constitutional principle, as well as a UE fundamental right.[123]

In the solidarity chapter, the Charter recognizes in the article 33, first paragraph, the possibility for families to enjoy legal, economic and social protection, and in the second paragraph, the right for everyone to protection from dismissal for a reason connected with maternity, as well the right to paid maternity leave and to

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[122] Article 6, paragraph 1 TEU : "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
Paragraph 3 of the same article: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

[123] S.K. Spiliotopoulos, *The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the acquis in gender equality*, in S.Burri, I.Chopin, S.K. Spiliotopoulos, H. van Eijken, M.van der Lans *European Gender Equality Review*, The European Network of Legal Experts in the field of Gender Equality, n.1/2008, p. 22.
The document is available at:
http://ec.europa.eu/justice/gender-equality/files/egelr2008-1_en.pdf

parental leave after the birth or adoption of a child. This article aims at legally acknowledging a fundamental right for parents and children, firstly issuing forms of family protection, and secondly dealing with reconciliation of family and private life with work. In addition, in paragraph 2 the right to paid maternity leave has been provided, surpassing in this way the minimum requirement of directive 92/85.[124]

However, the Nice Charter omits some significant developments permitted by the directives considered so far. For instance, the Charter does not include among the fundamental rights for pregnant workers, the right to maintain employment rights during and after pregnancy and to return to the same equivalent post[125], as well the prohibition of any unfavourable treatment related to pregnancy, maternity and parenthood[126].

Despite these gaps, the Charter of Fundamental Rights contains some further rights, which go beyond the issue of gender equality between men and women. Article 53[127] represents an important provision, as it intends to maintain the level of protection currently conferred by other sources. It repeats, in fact, the principle of international human rights law, already expressed in several treaties, according to which rules more favourable to human rights prevail, whatever their source, the principle of *lex superiori* and *lex specialis*[128]. This article, consequently, conditions the interpretation and application of the whole Chapter, and will influence in the development of current and future standards. [129]

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[124] See par. 1.5. The directive provided a minimum requirement, that could be considered adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health (article 11, paragraph 3 of the 92/85 directive).

[125] As established by Pregnant Workers directive 92/85.

[126] Issued by the Equal Treatment Directive 2002/73, that amended the 76/207 Directive. For more information see paragraph 1.3.

[127] "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions" (Article 53 of The Charter of Fundamental Rights).

[128] Generally, according to those principles, in case of conflict of norms, superior norms suppress inferior norms and in the event that two laws govern the same factual situation, a law governing a specific subject matter overrides a law which only governs general matter. Article 53, on the contrary, points out that they do not apply in case of rules favouring human rights.

[129] S.K. Spiliotopoulos, *The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the acquis in gender equality*, in S.Burri, I.Chopin, S.K. Spiliotopoulos, H. van

To conclude, it could be asserted that the Charter represented an important step since it expresses the EU intention and commitment to respect and protect fundamental rights.

## *10.2 The Treaty of Lisbon and the Charter of Fundamental Rights' status under the Treaty of Lisbon*

The Treaty of Lisbon, signed by the heads of state and governments of the 27 EU Member States on 13 December 2007 and amending the Treaty on European Union and the Treaty establishing the European Community, strengthened EU values and rights of EU citizens. In fact, its opening is characterized by an explicit reference to values on which EU is founded[130], including the principle of non discrimination and equality between men and women: this choice of EU legislator makes them surely more visible than in the previous treaties and gives to the Lisbon one a developed social dimension. At the same time, those principle already provided in the previous treaties, are mentioned again, such as for instance the principle of equality between men and women with regard to labour market opportunities and treatment, which is now expressed in article 157 TFEU. This article substantially reproduces the content of article 141 TCE, with whom the principle of equality lost his purely economic intention and became a fundamental principle, characterized by a wider area of application.

The first two paragraphs of the current article repeal the first two of article 119 EEC. It declares that Member States ensure the application of the principle of equal pay for male and female workers for equal work and defines the meaning of "pay" for the purpose of this article.

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Eijken, M.van der Lans, *European Gender Equality Review*, The European Network of Legal Experts in the field of Gender Equality, n.1/2008, p.21.

[130] Article 1: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

Paragraph 3 confers instead the specific legal basis for the adoption of measures designed to implement the principle of equality between men and women, for what concerns the access to employment and other field connected to it, such as vocational and further training as well the termination of the employment contract. It is necessary to stress that, as this paragraph points out, the European Parliament and the Council may adopt not only directives, but "measures", that imply all legal acts aimed at supporting and complementing Member States' action in such field.[131]

The legitimacy of positive actions is solely expressed in paragraph 4, where a reference to the unrepresented sex is made. This insertion, that consents to use positive measures also for men, is considered appropriate nowadays, given that there is the conviction that men workers are often disadvantaged by protective legislation for women.

In the new article 2 TUE, among the Union's fundamental values, are included the prohibitions of inequality and discrimination and it represents, therefore, a standard to evaluate if a Member State infringes them. Thus should implicate that the European Court of Justice rigorously verifies reasons and explanations given by the Member State, in case it adopts measures potentially discriminatory. [132] Nevertheless, it is important to underline that Member States are committed to respect these articles also due to their duty to sincere cooperation affirmed by the new Article 4, paragraph 3 TEU.

Likewise, article 8 TFEU is oriented to eliminate inequalities between men and women as well promote a better gender balance. This double aim is pursued both by Union's actions[133], that regard operative actions[134], and by EU policies.

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[131] Comment on Article 157 TFEU, in *Trattati dell'Unione Europea*, a cura di A.Tizzano, Collana "Le fonti di diritto italiano", Giuffrè, Milano, 2014, pp.1459-1466.

[132] In order to evaluate if those principle are respected, a Prevention mechanism and, if necessary a penalty one, are established by article 7 of the TEU. It declares that certain conditions must be met: it has to be a "clear risk of serious breach" of values mentioned in article 2 for the prevention mechanism; it has to be a "serious and persistent breach" of those values for the penalty one.
In reality, the prevention mechanism and the remedial action have never been applied, due to their extremely political approach. This occurs although some relevant cases have emerged in recent years, attesting the political unwillingness of EU institutions involved in these mechanisms to act against a Member State.

[133] The term "actions" has been maintained since the original expression in article 3, paragraph 2 TCE, where the term referred in a dynamical way to the combination of EU policies and operations.

Differently from other TFEU articles considered so far, article 8 has a specific function, that is imposing the purpose of equality between men and women in all actions that EU conducts, in accordance with its competences. Hence, it constitutes the establishment for *gender mainstreaming*,[135] as it sets that gender issues have to be considered both in the stage of elaboration and implementation of EU policies and actions.

It is possible to give practical effect to the mentioned rule, apart from soft law measures, with specific methods. Firstly, adopting instruments of specific protection, it could be possible to extend such guarantees of gender equality outside those fields of primary EU responsibility, even if congruent with its competences.[136] Secondly, inserting a rule that extends and reaffirms gender duties for Member States.[137] Additionally, dealing with financial instruments, EU could finance those programs that are focused on gender matters.

In last analysis the Treaty of Lisbon, as previously stated, affirmed that the Charter of Fundamental Rights of EU has the same legal value of the Treaties. A reference to it was inserted in article 6 TUE[138], which asserts that rights, freedoms

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On this issue see: Comment on Article 8 TFEU, in *Trattati dell'Unione Europea*, a cura di A.Tizzano, Collana "Le fonti di diritto italiano", Giuffrè, Milano, 2014, p.396.

[134] Like collecting data and statistics, monitoring, supporting action, exchange of good practice.

[135] On this issue see paragraph 1.8.

[136] For instance, directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

[137] E.g. Directive 2006/54/EC on the implementation of principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

[138] In truth, the reference in article 6, paragraph 1 TEU concerns an amended version of the Nice Charter. This occurred because, in 2004 during the negotiations for the Treaty Establishing a Constitution for Europe (TCE), the intergovernmental Conference incorporated in the Constitutional treaty an amended version of the Charter of Fundamental Rights of 2000. Subsequently, at the time when the Lisbon Treaty was signed, the amended version of the Charter was solemnly proclaimed and published in the Union's Official Journal with its explanation.

The main modifications of the revised Charter concern an additional 5th paragraph to article 52, that recites " the provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality".

In this way, it tries to exclude the direct effect of principles and to limit their invocability.

Furthermore, it represents also an attempt to limit Member States' obligation to respect the Charter Rights given that, according to paragraph 5, Member States may refer to the Charter only when they are implementing European Union law. This interpretation can be confirmed by Article 51 paragraph 1 of the amended Charter, which reads "the provisions of this Charter are addressed (…) to the Member States only when they are implementing Union law", meaning that Member States must respect the Charter's rights only in implementing provisions of directives or taking other measures aimed at complying with Union provisions.

and principles set out by the Charter of Fundamental Rights are recognized by the Union and that they, resulting from the constitutional traditions common to Member States, constitute general principle of the Union's law.[139]

## 11. The Parental leave directive

A new step in the EU gender equality legislation represented the awareness that more practical means were required to realize a better reconciliation of family and private life with work. The result of such consciousness was the Parental leave directive 2010/18[140] that was adopted by the Council and the European Parliament under the co-decision procedure and whose legal base was Article 155, paragraph 2 TFEU[141]. Actually, it reflects one of the key objectives of work family legislation, that in order to achieve equality between the sexes there must be equality not only in the labour market but also with respect to family care responsibilities. Nevertheless, despite the aims of shared parenting was on the European agenda for almost 30 years, EU work-family legislation has continually reinforced the role of the working mothers while failing to recognize that of working fathers.

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Nevertheless, this interpretation was not confirmed by the European Court of Justice, which declared that the Member States obligation is instead much wider, for the reason that they must respect fundamental rights not only in such cases, but also when they act within the scope of Union law.
See: S.K. Spiliotopoulos, *The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the acquis in gender equality*, in S.Burri, I.Chopin, S.K. Spiliotopoulos, H. van Eijken, M.van der Lans, *European Gender Equality Review*, The European Network of Legal Experts in the field of Gender Equality, n.1/2008, pp.18-20.

[139] It must be remembered that principles set out by the Charter of Fundamental Rights do not represent fundamental values for all Member States, as UK and Poland benefited from an opting-out condition regarding the Charter's application.

[140] Cfr. M.Weldon-Johns *EU Work-Family-Policies-Challenging Parental Roles or Reinforcing Gendered Stereotypes?*, in "European Law Journal", Vol.19, No.5, 2013, pp.662-681.

[141] "Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed." (Article 155, Paragraph 2 TFEU)

The directive was intended: to repeal the 96/34/EC[142] directive, in which some issues of legislation mainly critiqued were identified and reiterated in the process of revising it[143]; to implement the Framework agreement on parental leave that, concluded between the European social partners[144] on 18 June 2009 after six months of negotiations, revises the previous Framework agreement on Parental leave of 1995. It has symbolized a new milestone in the European Social Dialogue, given that it was the first time in the history of the European Social dialogue that a revision of a pre-existing framework agreement has been undertaken.

The Framework agreement, included among the annexes of the directive, aims at acknowledging those developments that took place in society as well in the labour market. For this purpose, it contains some of the major improvements in order to achieve better work-life balance[145].

First of all, it considers the growing diversity of the labour force: it applies to all workers, who have an employment contract or employment relationship as defined by the law, collective agreement and practice in force in each Member State. In detail, it declares that also "atypical workers", such as part-time workers, fixed-term contract workers and temporary agency workers[146], are entitled to an individual right to parental leave following the birth or adoption of a child as well

[142] Throughout the Parental leave Directive 1996 two main aims were pursued: the promotion and harmonization of parental leave; the promotion of equal treatment and opportunities between men and women. These were relevant aims because the previous experience of parental leave did not challenge traditional gender roles within different Member States. Nevertheless, due to the strong resistance to the previous Drafts Directives, the rights were presented as minimum standards with much of the detail being left to Member States to determine.

[143] The main critiques of legislation identify as areas of concern the lack of payment, the possibility of transferring leave, the lack of flexibility and the maternal ideologies influencing the legislation and its utilization.

[144] In particular, they were Bussinesseurope, Ueapme, Ceep, Etuc and Eurocadres/CEC.
As recognized EU social partners: Bussinesseurope speaks for all-sized enterprises in 35 European countries, being the leading advocate for growth and competitiveness at European level; UEAPME is the employers' organization and represents the interests of European crafts, trades and SMEs at European level; Ceep represents public enterprises and enterprises which carry out services of general economic interests; ETUC is a trade union organization that speaks with a single voice with the aim of influencing the EU decision-making process; Eurocadres represents almost six millions Professionals and Managers in Europe, focusing on an efficient force of the trade union movement.

[145] Cfr. *The revised parental leave Framework Agreement. An ETUC interpretation guide*, European Trade Union Confederation (ETUC); the document is available at: http://www.etuc.org/sites/www.etuc.org/files/The_Revised_Parental_Leave_Framework_Agreement_EN.pdf

[146] Clause 1, paragraph 3.

taking care of the child until the age defined by Member States and social partners, that in any case cannot exceed the eight years[147].

For what concerns the leave duration, it should be granted for minimum 4 months[148] and on a non transferable basis, in order to guarantee equal opportunities and treatment between men and women[149]. Specifically, to promote a more equal take-up of leave by both parents, at least one of the four months shall be provided on a non-transferable basis[150]. National legislation and collective agreements have to determine the modalities of application of the non-transferable period, likewise they can define the conditions for the employer to allow a postponement of parental leave.

As established by the previous directives, also this one includes some non-discrimination orders and reaffirms the right to return to the same equivalent job at the end of parental leave and to be protected against less favorable treatment and dismissal[151]. Nonetheless, it does not contain any provisions regarding the payment of salary or compensation during parental leave, despite in the framework agreement there is greater emphasis on the importance of some form of income replacement during leave. On the contrary, it gives to EU Member States and national social partner the likelihood as well as the obligation to determine them. This is particularly problematic because it is clearly evident that the payment of leave is identified as a key factor influencing fathers' use of leave.

The most innovative aspect of this directive, even if still weak, is the possibility for workers, when returning from parental leave, to request changes to their working hours for a period of time. Every alteration of this type has to be done by employers taking into account their and workers' needs[152]. Besides, in cases of

[147] Clause 2, paragraph 1.

[148] While in the previous Directive 96/34 the parental leave was provided for at least 3 months.

[149] The agreement defines in clause 3 the modalities of application of such leave, in order to give guidance to government and social partners as to how the right to parental leave might be applied in practice. It declares that, parental leave can be taken in a variety of ways, such as on a part-time basis( half-time over 6 months); in a fragmented way (few hours at a time over a certain period); in the form of a time-credit system (one month per year). Nevertheless, whatever option chosen, the total period of leave must be at least 4 months.

[150] Clause 2, paragraph 2.

[151] Clause 5, paragraph 1 and 4. Compared to its earlier version in the 1995 Agreement, this Clause has been considerably strengthened. In fact, it does not only provide a protection against dismissal, but also for every less favourable treatment against workers when taking up parental leave.

[152] Clause 6, paragraph 1.

*force majeure*, such as urgent family reasons like sickness or accident, workers are entitled to be absent from work.[153]

Lastly, the agreement stresses the possibility for Member States to improve the minimum requirements contained in the agreements as well the duty not to use the transposition or application of the directive as a pretext for reducing the level of protection acquired prior to the transposition of the directive.[154]

In conclusion, it is possible to remark that although the Parental leave directive identified key issues that have to be addressed, these are not binding on Member States.

This can imply that, if Member State adopt an inadequate implementation of minimum standards, it will not provided a clear and significant purpose for parental leave across Europe, as well it will undermine equality between sexes.

## 12. The progress of the EU decision-making process

In analyzing the evolution of the gender equality principle within the EU dimension and of those directives adopted for this purpose, it is necessary also to examine how the EU decision making process currently operates and evolved over the years.

In the EU decision-making process it is possible to see the involvement of the Commission, the European Parliament and the Council and to attest, therefore, the fundamental relation that exists among them. [155]

Since the Treaty of Rome, the Commission has been the initiator of Community legislation, for the reason that it enjoys the right of initiative and subsequently a monopoly of this power. Nevertheless, originally the Council was the sole institution devoted to proceed to act on a proposal of the Commission, while the European Parliament had a mere advisory role.

[153] Clause 7.
[154] Clause 8, paragraph 2.
[155] Consultative bodies of the European Union could also participate where its opinions are required on the basis of a mandatory consultation in the fields established by the Treaties, or a voluntary consultation by the Commission, the Council or the Parliament.

The Treaty of Maastricht introduced the co-decision procedure[156], that became the ordinary legislative procedure with the Treaty of Lisbon. It enabled the European Parliament to co-legislate and to adopt instruments jointly with the Council of the European Union. Therefore, it becomes co-legislator, except for those cases where the procedures regarding consultation and approval apply.[157]

Besides, the Treaty gives to the EP a right of initiative. Acting by a majority of its members, it may request the Commission to submit any appropriate proposal in those matters where a Community act is required for the purpose of implementing the Treaty.[158] The role of the EP has been further enhanced by the Treaty of Amsterdam, establishing that the co-decision procedure should be followed in a set of field, one of which is the principle of equal treatment of men and women expressed in article 137 TEC.

For what concern the modalities of this procedure, the Council and the Parliament adopt legislative acts either at first reading or at second reading. If, following the second reading, the two institutions have still not reached an agreement, a Conciliation Committee is convened[159]. As a general rule, the Council acts by qualified majority; nevertheless, it shall act unanimously on the amendments on which the Commission has delivered a negative opinion or if an act constitutes an amendment to the initial Commission proposal. On the other side, the European Parliament acts by an absolute majority of its component members to reject the Council common position or to propose amendments to it.

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[156] Defined by article 294 TFEU.

[157] In fact, in special legislative procedures the Council is the sole legislator, while the European Parliament's role is limited to consultation or approval depending on the case.

[158] Cfr. R. Blanpain, *European Labour Law*, Kluwer Law International, 2008, p.108.

[159] In more detail, the Council, after obtaining the opinion of the European Parliament, can approve all the amendments contained in the European Parliament's opinion and, acting by a qualified majority, adopt the proposed act and thus amended; if the EP does not propose any amendments, may adopt the proposed act; shall otherwise adopt a common position and communicate it to the EP as well inform of the reasons which led to adopt it. Within three months the EP could reject the common position or propose amendments; could approve the common position or not to take a decision. In this case the act is deemed adopted in accordance with common position.
In case of amendments made by the European Parliament, the Council, acting by qualified majority, can approve all of them and the act is considered adopted in the form of the common position thus amended. A Conciliation Committee is instead convened by the president of the Council in agreement with the President of the European Parliament, if the Council does not approve all the amendments. It has the purpose of reaching agreement on a joint text that, within six week could be approved by the two institutions. If either of the two institutions fails to approve within the period, it shall be deemed not to have been approved.

Thanks to the analysis of the directives considered so far, it is possible to note relevant changes also in the voting system at the Council.

Initially in fact, although the Treaty of Rome allowed the qualified majority, in the practice the Council regularly acted by unanimity.[160] This means that a right to veto was available to each Member States and, considering that important directives in the matter of equality of pay and equality of treatment were adopted, this made evident the willingness of all Member States to advance in the gender equality field.

Since the adoption of the Single European Act in 1986, the qualified majority rule was declared again and cases in which the Council can take decisions by qualified majority voting instead of unanimity have been increased.[161]

Presently, in the social field the Council can adopt by qualified majority directives concerning the health and safety of workers, their working conditions, the information and consultation, the equal treatment between men and women, the integration of excluded persons. Nevertheless, there are still areas in which the Council has to proceed unanimously, for instance in the field of social security and social protection of workers, job security, representation and collective defense including co-determination, financial contributions for promotion of employment.

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[160] In truth, this was the consequence of a crisis, known as "empty chair crisis". In 1965 France boycotted the meetings of the Council and insisted on a political agreement concerning the role of Commission and the majority voting. The crisis was resolved in 1966 thanks to the Luxembourg compromise that implied the usage of unanimity even when the qualified majority was established by the Treaty.
Cfr. U.Villani, *Istituzioni di Diritto dell'Unione Europea*, Bari, Cacucci Editore, 2010, p. 146.

[161] The qualified majority system in the Council was subjected to relevant changes:
the earlier amending treaties had established a system of vote weighting, although updated by the Treaties of Nice and Amsterdam in order to adapt it to the successive enlargements of the European Union. Under this system, each Member States had a certain number of votes depending on its demographic weight. Therefore, a decision was adopted only if a certain vote threshold was reached by a majority of Member States.
With the Treaty of Lisbon a dual majority system for adopting decisions has been established, that will apply with effect from 1 November 2014, but until 31 March 2017 any Member State may request that the decision is taken in accordance with the rules before 1 November 2014. This system expects that a qualified majority is achieved if it covers at least 55% of Member States, representing at least 65% of the population of the EU. Where the Council, instead, does not act on a proposal from the Commission, the qualified majority should cover at least 72% of Member States representing at least 65% of the population. Consequently, this system assigns a vote to each Member State while taking account of their demographic weight. In addition, a blocking minority is allowed if composed of at least four Member States representing over 35% of the population.

In this last paragraph it has been attested how the evolution of the decision-making process has positively affected the quality of EU gender equality legislation. The involvement of the EP as well of social partners, the adoption of the qualified majority system instead of unanimity, have concretely permitted a *quantum leap* not only in the equality agenda, but in the EU social policy in general.

This chapter, on the other hand, has examined all the relevant binding instruments of primary and secondary law which aspired at implementing the principle of equality between men and women among Member States, as well important aspects of social policy related to male and female workers. Moving from the original purpose of equal pay, EU lawmakers have realized an extensive body of rules in this field. It is a clear attempt not only to put such purpose into practice, but also to increase and to promote the presence of women in the labour market at all levels by means of measures combating gender segregation as well a better work-life balance.

Nevertheless, despite the principle of Equality between men and women has become one of the fundamental principles of Community law as well of democratic societies, and a lot of progress has been made over the past few decades, there still remain inequalities between men and women.

This is the reason why the European Commission has recently decided that it is time to break the glass ceiling for Europe's women and has therefore taken a strong position on internal gender balance. In the next chapter, it will be analyzed all steps that brought the Commission to propose a new directive on gender balance in business leadership.

# Chapter 2

## *The aim of gender balance in decision-making positions in the EU policy framework*

In this chapter the specific and living matter of gender imbalance on corporate boards will be analyzed, that is an important challenge for all EU Member States. Despite EU Institutions made significant progress over the last 50 years in promoting greater equality between women and men in society and in the labour market, there is still a low level of participation of women in positions of responsibility.

This occurs because women continuously face barriers not only in leadership positions, that are only the tip of the iceberg, but in the whole labour market in general. These barriers derive from a combination of stereotypical attitudes and perceptions, which can influence attitudes toward women in senior positions and as leaders.[162] The most relevant stereotype is related to the traditional division of labour, that stresses the view that women should take primary responsibility for raising the family and thus induces doubts about their capacity to fulfill this role together with a professional career, particularly at senior level[163].

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[162] On this issue see: M.C. Mattis, *Corporate Initiatives for advancing women*, in "Women in Management review", Vol. 10, No. 7, 1995, pp.5-14.

[163]*More Women in Senior Positions. Key to economic stability and growth*, European Commission, 2010, p. 35.
The document is available at:
http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=476&furtherPubs=yes

Another kind of stereotype is related to gender-based personal characteristics, where preconceptions tend to classify women into certain occupational roles and sectors of employment and exclude them from management positions.[164] In addition, women could face also other obstacles linked with educational choices[165] as, once in the labour market they remain more concentrated in few sectors of activity than men[166], as well the lack of support to balance care responsibilities with work.[167]

Nevertheless, it occurs that even women who have successfully overcome the mentioned obstacles are ultimately faced with continuing barriers to their advancement to the highest levels of decision-making.

In the light of such situation, the Commission started taking specific initiatives in order to allow a real gender balance in business and leadership positions. The instrument considered more appropriate to realize equal opportunities is positive action[168]; hence after the Commission used this term for the first time in 1981,

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[164] Ibidem.

[165] Women are, in fact, still under-represented in sciences, technology, engineering and mathematics subjects, which are most in demand in the labour market. These gender differences are related to students' attitudes towards subjects and they are also connected to the perception of men's and women's different roles in society. On this issue see:
Gender balance in business leadership: a contribution to smart, sustainable and inclusive growth, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, 2012, p. 9. It is available at: http://ec.europa.eu/justice/gender-equality/files/womenonboards/communication_quotas_en.pdf

[166] It is possible to observe that women make up almost 80% of those working in health and social work and over 70% of those employed in education. Equally, among sectors in which men are concentrated , women make up just 8% of the work force in construction and only 14% of that in land transport.
See: A.Franco, *The concentration of men and women in sectors of activity*, Eurostat, 2007, p. 2. The document is available at:
http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-07-053/EN/KS-SF-07-053-EN.PDF

[167] It is fundamental to consider that in this context the Barcelona objectives were set in 2002 in order to guarantee high quality and affordable facilities for young children, from birth to compulsory school age. Despite that, only ten EU Member States have met the objective of 33% childcare coverage rate for children under three; and only nine Member States have met the objective of 90% coverage rate for children between three years old and the mandatory school age.

[168] Positive action under Community law includes all kinds of measures such as dissemination of information, consciousness-raising, incentives for the recruitment of women, special vocational programs and maternity leave. Quotas for the recruitment and promotion of women are the most debated type of positive action, due to the fact that it necessarily and immediately excludes the competitor. Nevertheless, it is important to stress that while a weak quota implies that a preference is given to a woman only when she is as qualified as the competing man, a strong quota reserves positions to women even when they are less qualified (above a certain minimum of qualification) than male candidates.
On this issue see: A.Peters, *The many meanings of equality and positive action in favour of women under European Community Law – a conceptual analysis*, in "European Law Journal", Vol. 2, No. 2, 1996, pp. 177-196.

several documents of different normative force that call for positive action in favor of women were enacted. Nonetheless, due to the fact that directives allowing Member States to adopt positive actions and not-legally binding but relevant instruments have failed to break the glass ceiling, EU Commission proposed on 14 November 2012 a specific directive to tackle the under-representation of women on boards of EU companies.

## 1. The inadequacy of not-legally binding instruments focused on positive actions: the Council recommendations 84/635/EEC, 96/694/EC and the EU Commission Strategy for Equality between men and women 2010-2015

The participation of women in decision-making bodies has already been promoted over the years through the adoption of two relevant soft law acts, in order to encourage self-regulation. Firstly, the Council recommendation 86/635/EEC highly recommends to Member States to adopt a positive action policy, as well to the private and public sector to increase the presence of women at all levels of decision-making, especially by positive actions programs. Secondly, the Council recommendation 96/694/EC on the balanced participation of women and men in the decision-making process.

It is necessary to point out that, in that period, the only EU legal provision concerning positive action was article 2, paragraph 4 of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions. Moreover, the text of this article appeared to allow a very generous interpretation of positive action.[169] It tolerates almost any measures, including sex-based preferences that in any way promote women's opportunities

[169] "This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1" (Article 2, paragraph 4).

in the labour market. In reality, as already pointed out in the previous chapter[170], the European Court of Justice did not seem to agree with such interpretation.

In this scenario, such provision was completed by the mentioned recommendations. The Council recommendation of 1984 declares in the preamble the inadequacy of existing legal provisions on equal treatment for the elimination of all existing inequalities, unless parallel action is taken by governments, both sides of industry and other bodies concerned.

In order to achieve these purposes, the recommendation encourages Member States, in the framework of the positive action policy adopted, to promote the participation of women in those sectors of working life where they are currently under-represented and at higher levels of responsibility; it encourages to eliminate the prejudicial effect on women in employment or seeking employment which arise from existing attitudes, behavior and structures based on the idea of a traditional division of roles in society between men and women. Additionally, it called upon the Commission to take steps to achieve balanced gender participation in this regard.

The Council recommendation of 1996 on the balanced participation of women and men in the decision making process continued pursuing the same purposes provided by the previous one. It recommends that Member States adopt a strategy for balanced participation and introduce the necessary measures to achieve this aim, such as legislative and regulatory measures or incentives. Nonetheless, the recommendation does not give a definition of the term "balanced participation" and did not fix a threshold that, if attained, would make the goal of the recommendation realized. Member States have therefore a choice which percentage of women in decision-making bodies they consider as being balanced.[171] Furthermore, it calls on the Community Institutions, agencies and bodies to design a strategy for a balanced participation. In implementing the

[170] Paragraph 1.9.2.

[171] In reality, it emerged from the countries reports' that if the number of women or men in the decision-making processes is under the threshold of 30% no real influence of either group can be exercised.

recommendation, the focus of most institutions was stronger on recruitment and promotion of women than on the composition of committees advising them.[172]

The fact that, for more than two decades, these two non-binding recommendations represented the only EU texts developing the specific use of positive action measures, together with the imprecise character of measures to be adopted according to it, revels the wide divergences in the approach of EU Member States to positive action measures.

The debate about positive action has been at a later stage revitalized thanks to the action of one non-member State, Norway, that in 2006 adopted a far-reaching model of positive action concerning the participation of women in the boards of commercial companies, requiring a minimum of 40% of women on all company boards of publicly listed companies. The rule had to be implemented within a two-year period and, in case companies failed to comply, they would have faced serious consequences, including the judicial decision to dissolve the company.

The Norwegian experience, besides, influenced several of the Union's Member States which have since then adopted positive actions model.[173]

After having illustrated the first legal acts that concretely opened the way to positive actions, it is important to focus the attention on the Strategy for Equality between women and men 2010-2015[174], another soft law instrument in which the Commission identifies the purpose of equality in decision-making as one of its priorities. It determines Commission's key actions, which concern the monitoring of 25% target for women in top level decision-making positions in research[175]; the monitoring of progress towards the aim of 40% of members of one sex in

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[172] See: Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation of Council Recommendation 96/694/EC OF 2nd December 1996 on the balanced participation of women and men in the decision-making process COM (2000) 120 final.
It is available at:
http://csdle.lex.unict.it/Archive/LW/Data%20reports%20and%20studies/Reports%20and%20%20communication%20from%20EU%20Commission/20110804-101304_com_2000_120enpdf.pdf

[173] G. Selanec and L.Senden, *Positive Action Measures to ensure Full Equality in Practice between Men and Women, including on Company Boards*, European Network of Legal Experts in the field of Gender Equality, 2011, p. 1.
The document is available at:
http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender-balance_2012_en.pdf

[174] COM (2010) 491.

[175] In reality, the 25% EU goal has already been set in 2005, nevertheless the target is still some way off as only 19% of full professors in EU universities are women.

committees and expert groups established by the Commission; the promotion of greater participation by women in European Parliament elections including as candidates. A direct result of the Strategy has been, after dialogues with business leaders and representatives of social partners, the launch on 1 March 2011 of "Women on the board pledge for Europe", realized by Viviane Reding, Vice-President of the European Commission and EU Commissioner for Justice, Fundamental Rights and Citizenship. It is a call on publicly listed companies in Europe to sign a voluntary commitment to increase women's presence on their corporate boards to 30% by 2015 and 40% by 2020 by means of actively recruiting qualified women to replace outgoing male members.

Figures show that between October 2011 and January 2012 a progress has been registered, nevertheless it continues to be very limited.[176] This development is certainly linked to the intensified public debate initiated by the Commission's call for action which, given the lack of sufficient progress in achieving gender balance on boards, explores policy options for targeted measures to enhance female participation in decision-making at European Level.

## 2. The legislative turning point: the Proposal for improving gender balance among non-executive directors of publicly listed companies

On 14 November 2012 the European Commission, on the initiative of its Vice-President Viviane Reding, took action against all barriers that obstruct female talent from top positions in Europe's biggest companies. This phenomenon, widely-known as "glass ceiling" that perpetuates the selection of people with similar profiles and obstruct the progress of women in the society, tries to be

[176] In January 2012, the average number of female boards members in the largest companies listed in the EU was 13,7% compared to 11,8% in 2010. Moreover, only 3,2% of chairpersons were women in January 2012 compared to 3,4% in 2010.
See: *Women in decision-making in the EU: Progress Report*, European Commission – Directorate General for Justice, 2012, available at: http://ec.europa.eu/justice/gender-equality/files/women-on-boards_en.pdf

faced through a Proposal establishing a minimum 40% of gender balance among non-executive directors of publicly listed companies.

Having consulted the European Economic and Social Committee, that has supported the initiative, and being approved by the European Parliament, one of the two European Union's co-legislator, the proposal needs to be adopted jointly by the European Parliament and by the Council of the EU.

## *2.1 Purpose*

The goal of the proposal of directive is to ensure a more balanced representation of men and women, by establishing measures aimed at accelerating progress towards gender balance, while allowing companies sufficient time to make the necessary arrangements (Article 1).

More specifically, the purpose declared in the proposal is to increase the number of women on corporate boards throughout EU, by setting a minimum objective of a 40% of the underrepresented sex among the non-executive directors of companies listed[177] on stock exchanges. In reality, the proposal deals with an obligation of means: hence, for companies listed in which the under-represented sex is less than 40% of non-executive directors, it is required that pre-established, clear, neutrally formulated and unambiguous criteria in selection procedure for those positions are introduced in order to attain the said percentage.

The quantified objective of 40%, that is in line with the targets currently under discussion and set out in a number of EU Member States and European Economic Area (EEA) countries[178], only applies to non-executive directors[179]: this precise

[177] Which are "companies incorporated in a Member State whose securities are admitted to trading on a regulated market within the meaning of Article 4(1) (14) of Directive 2004/39/EC, in one or more Member States" Article 2, Paragraph 1 of the Proposal.

[178] This figure is strategically considered apt to attain the goal, because it is situated between the minimum of the "critical mass" of 30% which was found necessary in order to have a sustainable impact on board performance, and fully gender parity (50%). In fact, as Article 4, Paragraph 2 points out the number shall be closest to the proportion of 40%, but not exceeding 49%.

[179] They include "any member of a unitary board other than an executive director and any member of a supervisory board in a dual board system" (Article 2, Paragraph 5).

choice aims, on one hand, at increasing the gender diversity of boards and, on the other hand intends to minimize interference with day-to-day management of a company. In order to achieve such purpose, non-executive directors and supervisory boards have an essential role in appointing the highest level of management and shaping the company's human resources policy. In the selection of non-executive directors, Member States shall ensure that priority should be given to the candidate of the unrepresented sex if he/she is equally qualified as a candidate of the other sex in terms of suitability, competence and professional performance, except if an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex.[180]

The proposal concerns publicly listed companies, owning to their economic importance and high visibility. In addition, it should be considered that they tend to have larger boards and a similar legal status across the EU, allowing the necessary comparability of situations. This means that small and medium-sized enterprises with less than 250 employees and an annual turnover that does not exceed 50 million EUR[181] are excluded from the scope even if they are publicly listed.

The proposal includes also, at article 5, an obligation for listed companies to undertake individual commitment regarding the representation of both sexes among executive directors, to publish information regarding the representation of their boards.

Companies should conform themselves to the directive, attaining the said percentage, at the latest by 1 January 2020 or by 1 January 2018 in case of listed companies which are public undertakings.[182] In case a listed company does not meet such objectives by the established date, they should provide also the reasons

[180] Article 4, Paragraph 3.

[181] For an SME which is incorporated in a Member State whose currency is not the euro, the equivalent amounts in the currency of that Member State.

[182] It refers to those "undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership thereof, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly in relation to an undertaking:
hold the major part of the undertaking's subscribed capital; or control the majority of the votes attaching to shares issued by the undertakings; or can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body." (Article 2, Paragraph 9)

for not reaching the objectives or commitments and a description of the measures which the company has adopted or intends to adopt.

Article 6 of the proposal deals with sanctions and declares that Member States should establish rules on sanctions applicable to infringements of national provisions adopted consequent to the directive. Sanctions include administrative fines and the nullity or annulment declared by a judicial body of the appointment or of the election of non-executive directors. Nevertheless, given that the proposal allows minimum requirements in accordance with article 153 TFEU, paragraph 1, Member States may introduce or maintain provisions which are more favourable than those laid down in this Directive[183].

## *2.2 Legal aspects*

The proposal is based on Article 157 TFEU, paragraph 3 that is the specific legal basis for any binding measures aiming at ensuring the application of the principle of equal opportunities and equal treatment between men and women in matters of employment and occupation, including positive action providing for specific advantages in favor of the under-represented sex.[184] The directive is considered by the Commission the appropriate legal instrument due to the fact that, it allows Member States to adapt the detailed regulation to their specific situations in terms of national company law and to choose the most pertinent means of enforcement and sanctions. It also allows individual Member States to go beyond the minimum standard, on a voluntary basis.

In reference to the principle of subsidiarity, the Commission stresses that the current EU situation, in which several Member States introduced various measures to face inequality while other Member States have not yet take action in this area, could compromise the attainment of the fundamental objective of gender equality in economic decision-making across the Europe. Moreover, according to

[183] Article 7.

[184] Cfr. Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM(2012) 614 final.

the IA[185] report, that is based on comprehensive information on existing or planned legislative and self-regulatory initiatives in this area in all Member States, the female representation in boards of publicly listed companies without EU action is expected to remain at a low rate[186].

Furthermore, divergent regulations at national level risk to create practical problems in the functioning of the internal market. For instance, diverging rules or the absence of rules on the selection procedure for the key-positions of non-executive board members, such as the impact of these differences for corporate governance and the estimation of corporate governance by investors could lead to problems for the functioning of internal market.[187]

The Commission came therefore to the conclusion that action taken individually by Member States will not achieve the objective of a more balanced gender representation on company boards nor by 2020 or at any other point in the foreseeable future. Rather, such purpose may be better achieved through coordinated action at EU level instead of national initiatives of different ambition and effectiveness. For all these reasons, the proposal is considered complying with the principle of subsidiarity.

The proposal is considered in compliance also with the principle of proportionality: the Commission focuses the attention on the fact that non-binding measures such as past EU level recommendations and calls for self-regulation did not achieve and are not expected to achieve the aim of improving gender equality in economic decision-making throughout the EU. However EU action, that is necessary to achieve those aims, should not go beyond what is strictly required to achieve sustainable progress in the share of women on company boards, without influencing on the functioning of private companies and the market economy. In fact, it should be underlined that the directive sets common objectives, while

[185] I.e. the Impact Assessment, that gives decision-makers evidence regarding the need for EU action and the advantages and disadvantages of alternative policy choices. They are prepared for the Commission initiatives expected to have significant direct economic, social or environmental impacts.

[186] In particular, it is expected to evolve from 13.7% in 2012 to 20.4% (20.84% excluding SMEs) in 2020 for the EU. Only one Member State (France) will have achieved a 40% female representation in boards by 2020 as the result of national binding quota legislation. Only 7 more Member States - Finland, Latvia, the Netherlands, Slovakia, Spain, Denmark and Sweden - are estimated to reach 40% before 2035.

[187] COM(2012) 614 final, pp.9-10.

Member States maintain the necessary freedom to determine how they could best attained, in the light of national, regional and local situation as well company law and company board recruitment practices. The directive simply requires those changes to national company law necessary for the minimum harmonization of requirements, respecting the different board structures across Member States. As already said before, it does not apply to small and medium-sized enterprises and it covers only non-executive directors, in order to limit interference in the daily management of the company.

Finally, the temporary nature[188] of the proposed directive reinforces its compatibility with the principles of subsidiarity and proportionality.

## 3. The current debate on the issue of women on boards: lights and shades of the proposal

The proposal of directive of 14 November 2012 represented a *coup médiathèque de maître*[189]. For the first time at EU level, a legislative proposal set off so much attention and opposition at the same time.

Particular attention should be paid to the pivotal provisions of the proposal.

Firstly, it should be remarked that the obligation of means is related to those companies in which the underrepresented sex is less than 40% of non-executive directors.[190] But, article 4, paragraph 6 provides one possibility to justify the non-attainment of the established threshold, when members of the underrepresented sex are less than 10% of effective workforce in the company.[191] So, it has been

[188] The directive shall expire on 31 December 2028. (Article 10, Paragraph 2)

[189] Cit. M. V. M. van Beek, *Vers un meilleur équilibre hommes-femmes parmi les administrateurs non-exécutifs des sociétés cotées – Initiative visionnaire ou téméraire ?*, in ″Revue du droit de l'Union Européene″, n.1, 2013, p. 82.

[190] Furthermore, the objective laid down is met even in the case listed companies show that members of the under-represented sex hold at least one third of all director positions, irrespective of whether they are executive or non-executive. (Article 4, Paragraph 7)

[191] The EU Commission explains this choice, arguing that the gender composition of the workforce has a direct impact on the availability of candidates of the under-represented sex (Recital 31 ).

declared that probably the exception provided in article 4, paragraph 6 would continue to make women resting in the current situation.[192]

The second point that should be observed is the presence of sanctions at article 6. Nevertheless, they do not apply to those companies that do not reach 40%; the proposal, in fact, imposes at article 4, paragraph 1 an obligation of means and not of results. Rather, sanctions will be imposed to those enterprises listed which do not set up by the deadline a transparent procedure, by applying pre-established, clear, neutrally formulated and unambiguous criteria for the selection of candidates to non-executive directors positions. The real innovation is that, for the first time in the field of social policy and non-discrimination between men and women, the proposed provision include a list of concrete and possible sanctions.[193]

## *3.1. Legal basis, subsidiarity and proportionality: infringed or not?*

The choice of article 157 TFEU, paragraph 3 as legal basis of the proposal is considered the logic decision, due to the fact that it is the legal basis of all binding measures aimed at ensuring the application of the principle of equality and equality of treatment between men and women.

A much wider debate arose on the respect of principle of subsidiarity and proportionality, as well the adequacy of obligatory gender quotas.

For what concerns the principle of subsiadiarity, according to the proposal's supporters, the European Commission is allowed to take action in this field, even if paragraph 4 of article 157 TFEU declares the freedom for Member States to adopt positive actions in favor of the under-represented sex. In fact, given that the equality between men and women is one of the fundamental EU values as well a fundamental right, the European Union fights against sex discrimination and social exclusion, promising the achievement of such principle[194]. More

[192] Ivi, pp. 76-77.
[193] Ivi, pp.78-79.
[194] As proclaimed by Article 2 TEU, Article 23 of the Charter of Fundamental Rights and Article 10 TFEU.

specifically, paragraph 3 of article 157 TFEU states that the legislator, on a proposal from the Commission, can adopt all legislative acts aimed at ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value. Then, the proposal of 14 November 2012 is part of goals of that paragraph.

Nevertheless, it was observed that such kinds of measures cannot be unlimited. In fact, if a measure that permits an exception to the principle of equality of opportunities was limitless, once reached equality, it would become discriminatory.[195]

Another school of thoughts emerged, in which the major exponents are primarily national parliaments[196]. They are in the view that the draft Directive is premature and infringes the principle of subsidiarity. According to them, national measures aimed at promoting more gender-balanced boards were introduced in Member States only in the last few years and the application of those measures remains still in the early stage. Hence, it is too soon to assume that they are ineffective and to claim that EU action is necessary.[197]

Additionally, it was declared that the principle of proportionality is not even respected, noting that the quota found in the Draft directive is clearly disproportionate with respect to all the recognized aims that justify gender equality on the boards of EU. In their opinion, in fact, compulsory quotas are disproportionate, because requiring positive policies in companies in the process of selecting candidates for their boards is not necessary to realize gender equality. On the contrary, it is sufficient to force these companies to respect the simple

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[195] M. V. M. van Beek, *Vers un meilleur équilibre hommes-femmes parmi les administrateurs non-exécutifs des sociétés cotées – Initiative visionnaire ou téméraire ?*, in ″Revue du droit de l'Union Européene″, n.1, 2013, pp. 72-74.

[196] Countries which have actively criticized the proposal are United Kingdom, Germany, the Netherlands, Sweden, the Czech Republic, Poland and Denmark. They have, in fact, sent a letter to the European Commission, stating that they are planning to vote against the Directive, forming, thus a blocking minority.
Data back to September 2014. The information was taken on the website:
http://www.parliament.uk/documents/lords-committees/eu-sub-com-b/Scrutiny/LettertoSoSreWomenonBoards110914.pdf

[197] M. Szydlo, *Gender equality on the Boards of EU Companies: between Economic Efficiency, Fundamental Rights and Democratic Legitimisation of Economic Governance*, in "European Law Journal", 2013, p.16.

prohibition of discrimination on the basis of sex. Nevertheless, companies should be bound by the EU fundamental right of equality between men and women, but through an act of secondary law in its negative, and not positive, dimension. Therefore, a gender quota for boards would be compatible with the principle of proportionality only if it were a non-binding postulate or suggestion, being deprived of any concrete sanction.[198]

Under these circumstances, the directive is not considered the appropriate legal act, due to the fact that the EU cannot impose its own vision on Member States and cannot undermine their previous actions that were taken to make their economic governance more democratically legitimized.

Furthermore, the directive is conceived as an intromission of public authorities into business activities' companies. Public authorities should not force private companies to take specific types of economic actions, including the appointment of gender-balanced boards, that authorities consider to be the most economically appropriate and reasonable. Consequently, it is general opinion among those opposed to the directive that, instead of adopting the draft Directive introducing a compulsory gender quota, EU should adopt other types of actions that include legal instruments and measures without the status of legal acts. For instance, the Commission could encourage or organize recruiting, training, mentoring and networking programs that emphasize the representation of more women in the boardroom; then gender equality on boards can be enhanced through the use of public procurement or extending the scope of admissible state aid for female entrepreneurship. Finally, even a directive promoting gender equality on boards of companies could be adopted, but only if it omits a compulsory gender quota.

[198] Ivi, pp.14-15.

## *3.2 Economic aim for gender-balanced boards and its inclusion among EU Fundamental Values*

The other points of the proposal that have provoked discussion regard the justifications given for the draft Directive. According to some authors, what deserves critiques is the fact that the Commission puts forward those arguments that seem more convincing, completely ignoring counter arguments on which it could be better to develop a public debate and to increase the support for the proposal within the general public.

In the proposal's explanatory memorandum and in the preamble, the Commission stresses the economic effects of gender balance on the boards of companies as the strongest arguments for promoting the participation of women in boardrooms. According to the Commission, the proposal is supported by several economic arguments: firstly, more highly qualified women on boards would mobilize available human resources in the economy, allowing EU to compete more successfully in a globalised economy. It has been remarked, in fact, that increasing the participation of women on board corporations guarantee themselves the access to a greater and more diverse pool of talents and that an higher level of female representation results in higher gross domestic product growth rate.

The second assumption is the improvement of corporate governance. According to several authors an increased presence of women on boards enhances team performance and the quality of decision-making. They assert that a better governance is achievable through the sharing of a broader and different range of experiences, ideas and opinions in corporate discussions. It emerges also that women directors are more likely to have higher levels of accountability, given that they enhance the independence of the board and ensure more effective communication among the board and its stakeholders.

Then, the attention is focused on the positive relationship between gender diversity at the level of top management and a company's financial performance and profitability. It is shown that companies with the most gender-diverse boards

have greater average operating profits, higher returns in sales and on invested capital.[199]

Even if this kind of economic arguments are favorable for EU companies, it has been declared that the Commission only focused on the most convincing reasoning and completely ignores counter ones. More gender-diverse boards could reveal, in fact, some weaknesses in corporate boards. For instance, the process of balancing perspectives delays decision-making and may eventually make the board more divided than a less diverse board would be. Besides, costs should not be excluded, considering that diverse top management are generally more expensive and difficult to coordinate. In this way, increased costs may neutralize the increase in financial performance of a company.

It was discussed that another type of situation may occur, in which new women members of boards represent a very similar profile of thinking as the current male members, above all if these new women members continue to be recruited from among the business and personal contacts of current male board members. This circumstance usually takes place when male board members and other stakeholders have to face the legal obligation to comply with a gender quota.[200] Thus, it could result that they select women candidates they know very well and who represent a similar thinking and business attitudes as current board members. Consequently, this would not lead to the desired growth of board diversity, apart from simple sex diversity.

Hence, the fundamental criticism made to the proposal concerns the fact that it cannot be based solely on economic grounds. The justification of EU action aimed

[199] Nevertheless, it is shown that female representation in top management leads to a better firm performance but only to the extent that a firm is focused on innovation as part of its strategy.
See: C.L.Dezső, D.G. Ross, *Does female representation in top management improve firm performance? A panel data investigation*, in "Strategic Management Journal", Vol. 33, No 9, September 2012, pp. 1072-1089.

[200] In reality, the fact that a woman is recruited, only because a woman is needed, could reveal also some advantages. Some researchers have demonstrated that being recruited as tokens could have a great potential in becoming a board member and getting to the top, even if this puts great pressure on them. They meet several barriers to having influence and they have to prove to be competent in other ways than their male counterparts.
On this issue see: M. Huse, A. G. Solberg, *Gender-related boardrooms dynamics. How Scandinavian women make and can make contributions on corporate boards*, in "Women in Management Review", Vol. 21, No. 2, 2006, pp. 113-130.

at promoting the representation of women in boardrooms should analyze also other values, preferably of higher rank.

In justifying actions for promoting gender equality in boards, EU refers also to the fundamental right of equality between men and women enshrined in article 23 of the Charter of Nice, given that it authorizes EU institutions to enact positive action plans specifically supporting persons belonging to the under-represented sex. This reference is deemed more significant than the economic one, as it captures a principal and moral value inherently linked with human dignity: so, in the current debate developed around the proposal, the protection of this right is more important than encouraging economic benefits. In fact, if the increase of women on boards of companies is justified solely by economic benefits for the companies concerned, women would be reduced to simple factors of production which are mobilized to reach economic goals.

Nevertheless, some criticism was made also in relation to the second justification. It was observed that, precisely because the purpose of the proposal is included among EU fundamental rights, it should be realized through public actions, being traditionally perceived as a public task. Instead, in the situation reflected by the proposal, it is transferred to the companies and to the private sphere; it was argued that, in this way, EU institutions will materialize the fundamental right of equality between men and women through actions taken directly by private companies and at their expenses. [201]

[201] M. Szydlo, *Gender equality on the Boards of EU Companies: between Economic Efficiency, Fundamental Rights and Democratic Legitimisation of Economic Governance*, in "European Law Journal", 2013, p. 7-9.

## 4. The European Economic and Social Committee's opinion and the European Parliament's position: between supporting and enhancing

The proposal for a directive on improving gender-balance among non-executive directors of companies listed on stock exchanges and related measures received the European Economic and Social Committee's support and, at a later stage, the European Parliament's approval.

In the European Economic and Social Committee's opinion[202], adopted by 128 votes to 58 with 10 abstentions, it was pointed out how, although the Consultative Body usually prefers voluntary measures, in this case it welcomes the proposal. Figures show in fact that voluntary approaches are still slow[203] and therefore quotas are necessary.

Additionally, it recognizes the need to respect the freedom to conduct business and, in fact, it stresses that the proposed directive provides a minimum standard which allows Member States to progress beyond the measures recommended. In view of that, the EESC would aspire that this minimum standard could encourage self-regulation in order to avoid further regulation.

In the light of current economic situation, the EESC supports the argument that there is a correlation between the share of women on boards and the company's financial performance.[204] The improved performance of companies has been explained also with the fact that diverse gender representation on boards engages

[202] Opinion of the European Economic and Social Committee of 13 February 2013 on the "Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, available at:
http://www.eesc.europa.eu/?i=portal.en.press-releases.26782

[203] The EESC stresses in its opinion that in 2012 there was only a 0,6% improvement in the number of women on boards, with only 24 companies having signed the 2011 pledge. On the contrary, countries with binding quotas generally demonstrate a 20% increase in women on boards.

[204] The EESC concretely gives evidence of this statement, mentioning researches conducted by Credit Suisse, McKinsey and Catalyst which have identified this correlation. According to McKinsey report the Return on Equity (ROE) is 41% higher for companies with the highest proportion of women on boards compared to companies with no women on their boards; Catalyst found instead that companies with 14.3 – 38.3% women in top management had a ROE 34,1% higher than companies without similar levels of women in senior positions.

in diverse critical thinking around business decisions, creating a more proactive business model.

Measures put in practice in order to achieve the quantitative targets of directive would have positive effects on the actual gender imbalance on boards. They will certainly give greater visibility to women in senior roles, profiling women across different Member States that have achieved board-level positions and demonstrating the impact of board diversity on business success; there will be greater transparence in recruitment processes, that will encourage applications from all talented individuals; such measures are a step to challenge stereotypes around gendered roles: progress would be made against domestic roles that constitutes barriers to female economic participation. Finally, through the creation of a European-wide coordinated database, the risk of small minority of women being recruited into multiple positions would be reduced, and greater transparence in the recruitment process could be provided.

On 20 November 2013 the European Parliament adopted a legislative resolution[205] at first reading on the mentioned proposal, voting with a remarkable majority.[206] Nevertheless, some considerable important amendments are introduced firstly in the recital, and secondly in Articles.

The main points of the resolution mainly concern the importance of extending the scope of the Directive in order to efficiently increase its effectiveness and impact in all listed companies.

According to the two co-rapporteurs[207] all listed companies, independently from their size, should comply with the objective set by the Directive. This requirement could be explained by their economic and social responsibilities and their economic importance. However, the exception for SMEs as proposed by the Commission has to be maintained, while Member States should be encouraged to

[205] The document is available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0340+0+DOC+PDF+V0//EN

[206] 459 votes for, 148 against and 81 abstentions.
In particular, the ECR (European Conservatives and Reformists Group) and EFD (Europe of Freedom and Democracy) called the House to vote against the Proposal. Instead, the EPP (European People's Party), S&D (Socialists and Democrats) and ALDE (Alliance of Liberals and Democrats for Europe) supported the Report.
See: http://data.consilium.europa.eu/doc/document/ST-16284-2013-INIT/en/pdf

[207] That are Evelyn Regner and Rodi Kratsa-Tsagaropoulou.

put in place policies to support and incentivize them to significantly improve gender balance at all levels of management and on company boards.

Then, it was agreed to include a review clause calling on the Commission to examine if the scope of the Directive can be extended to non-listed public undertakings which do not fall under the definition of SMEs, non-listed large undertakings and executive directors of listed companies.

Additionally, the co-rapporteurs insist on explicitly stating that the Directive sets an obligation of means to Member States and companies to achieve the goal by adopting effective measures; they stress also that quota should be implemented on a temporary basis and that they serve as a catalyst for change and for rapid reforms designed to eliminate inequalities between men and women. In order to underline the necessity of such directive, a reference is made to certain Union institutions and agencies such as the European Central Bank which, in comparison with companies in the private sectors and especially listed companies, also display a deep problematic gender imbalance.[208]

As stated in the resolution, greater attention should be paid to the recruitment procedure. It has been underlined the necessity of a more detailed description of the recruitment process, in which the two co-rapporteurs strongly supported enhanced transparency in the nomination and election procedure of board members as it is the only way to efficiently guarantee diversity and selection on the basis of meritocratic criteria.

In relation to the failure to comply, it was argued that companies who fail to comply should provide a justification on the reasons for not reaching the objectives or commitment and which concrete measures are to be adopted in order to efficiently guarantee that the objective of enhanced gender-balance is met. Nevertheless, one of the most debated articles, the one that provided the possibility to justify the non-attainment of 40%, is instead deleted in the Report by the European Parliament.

The part dedicated to sanctions was suggested to be revised, declaring that Member States must provide that listed companies which do not establish, apply

[208]Draft European Parliament Legislative Resolution on the proposal for a directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, pp.46-47.

or respect the foreseen procedure for the appointment or the election of non-executive directors shall be subject to proportionate and effective sanctions. To the list of possible sanctions proposed by the Commission, they propose to include the exclusion from public falls for tenders and the partial exclusion from the award of funding from the Union's structural funds.

These kinds of amendments show that is in the general opinion of the European Parliament to enhance the Directive's information and efficiency: in fact, in order to do that, awareness and communication campaigns will have to be organized in order to properly and efficiently inform stakeholders and citizens on the impact of the Directive on both economy and society. These information campaigns will be fundamental to raise awareness among non-listed companies and encourage them to achieve gender balance proactively.

As stated before, the proposed Directive falls under the ordinary legislative procedure, which means that both the EP and the Council, being co-legislators, will have to adopt the same final text of the Directive. Having received the EP's approval, the Council of Ministers is then involved. This step is thought as one of the most complicated ones since ministers from all Member States have to debate on a issue whose approach differs drastically from one to another.[209] Nevertheless, the fact that several Member States[210] adopted in recent years legislative or administrative measures establishing quota or targets for gender representation on company boards, even if they vary considerably with respect to sanctions, probably proves that something in European approaches to gender inequality is changing.[211]

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[209] Actually, the national parliaments of Denmark, Netherlands, Poland, Sweden, United Kingdom and one of the two Chambers of Czech Republic submitted reasoned opinions within eight weeks from the submission of the Commission's proposal, alleging that it did not comply with the principle of subsidiarity. Nevertheless, no review of the proposal was required on the part of the Commission, given that the one-third threshold set out in Protocol 2 TEU, Article 7 had not been met.
On the other hand, it is important to remember that, in this case, qualified majority voting and not unanimity is required: this is expected to make the matter a little easier.

[210] France, Italy, Belgium, Netherlands, Spain, Denmark, Finland, Greece, Austria, Slovenia.

[211] The change, in all probability, follows suit the Norwegian example. Corporate board gender quotas, introduced in 2003 after a long record of quota policies, have worked in the Nordic country and have made boards becoming more professional and more global.
The information has been got from the website:
http://www.reuters.com/article/2013/09/30/us-nordic-investment-fund-idUSBRE98T0LM20130930

Despite initial objections to gender quotas, Member States are understanding that they should be needed as they are the right step to shatter the glass ceiling in order to make the world of managers more diverse and pluralistic. However, as the proposal of directives points out, they do not need to be permanent, but only a temporary and corrective measure in order to redress gender inequalities. And finally, they cannot be used alone. Focusing exclusively on specific measures, as previous strategies have done, makes gender equality solely a woman's issue. Rather, they have to go closely associated with the strategy of gender mainstreaming for the reason that, concentrating on men too, deals with transformative systems.

# Chapter 3

## *The evolution of Italian legislation on gender equality. From protective rules towards an enhanced model of parity on boards*

As it was with the EU lawmaking, even with Italian gender equality legislation it is necessary to identify some relevant periods: a first one designed to protect the social role of women as mothers; a second phase that dealt with the equality of opportunity approach aimed at promoting substantive equality through positive measures; a third phase, characterized by the adoption of the strategy of gender mainstreaming at EU level and resulting in relevant legislative measures directed to guarantee a better life-work balance.

Once the Italian Constitution, adopted after the Second World War, recognized the entitlement for equal pay of equal work in Article 37, laws adopted in the first phase intended to preserve the social role of women in relation to their maternity and to prevent discriminations in the labor market. In fact, laws no. 860/1950 and 1204/1971 both revealed the protective nature of maternity policies portraying women as a group in need of protection and pregnancy on the same footing of a disabling illness. Nevertheless, the first one represented the first major piece of equal rights legislation enacted by the newly established Italian Republic, and the second one was considered one of the most progressive maternity provisions in Europe. Since the seventies, furthermore, some EU relevant directives were implemented in Italian legislation, enhancing therefore the fragmented legal framework on equality between men and women.

In the second phase, it was attested a greater awareness that specific measures together with the principle of equal treatment were required, in order to balance

the initial disadvantages of women compared with men in social and economic life. Among laws adopted in this period is included Law no. 125/1991 for positive action that established the prohibition of indirect discrimination too, and acknowledged the value of gender diversity as well the equality of opportunity.

In the third phase, that is the one related to the new gender mainstreaming strategy, started to emerge the new issue of a better reconciliation between private and professional life, where the real turning-point has been provided by Law no. 53/2000.

Under this scenario, Italian legislator made a step forward by issuing an *ad hoc* law on diverse composition of companies management. Law no. 120/2011, that fixes a gender quota of 20% of the less represented gender for the Board of Directors of listed companies, follows at first the example of Norway, and second of Spain and France who decided to introduce gender quota in the form of obligation or recommendation. This new law attempts for parity in management and in corporate governance and expresses the intention of Italian legislator to break the well-known 'glass ceiling'. This is a real step forward in gender equality terms, which it is expected to be only a new starting point.

## 1. Protective laws in the field of gender equality

Equality between men and women is solemnly enshrined in the Italian Constitution. Gender equality is proclaimed first by Article 3 of the Italian Constitution, that on one hand establishes both the principle of formal equality and of substantive equality; on the other hand in prohibiting discrimination based on gender, it legitimizes the adoption of positive measures aimed at removing barriers which impede men and women from participating equally in the political, economic and social life of the country. Second, Article 37 of the Italian Constitution declares that both single and married women have the same capacity to contract a labour contract as men and working women are guaranteed the same rights as men.

Nevertheless, the initial Italian legislation enacted after the establishment of the new Italian Republic, showed a clear dependence of the political and social system on traditional family. This is the reason why women's work was traditionally limited by a wide range of law, justified by the need to protect their health and their essential functions in the family and in maternity.[212]

In this context, Italian welfare system was always focused on women's care work, directly influencing their access and employment in the official labor market.[213]

The first Italian law adopted by the new Republic was Law no. 860/1950 for the Physical and Economic Protection of Working Mothers[214]. Even if it was radical for that time due to the fact that it tried to regulate the employment relationships of pregnant workers, it confirmed the original idea of women as a group in need of protection. In fact, the most significant innovations of such law concerned the protection of women from unlawful dismissal on the grounds of pregnancy (Article 3); the establishment of basic health and safety requirements for the protection of pregnant workers (Article 4 and 5); the allowance for special arrangements for women who were breast-feeding (Article 9 and 10).

In the political debate arisen at that time, this law was deemed the cause for an excessive protection for women, realized also through discriminations in favor of women.[215] The most debated provisions were in fact the prohibition of dismissal and the consequent right to maintain the job for working mothers, for the reason that in that period none legislation forbade the employer to terminate the contract work.[216]

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[212] T. Treu, *Labour Law and Industrial Relations in Italy*, The Hague, Kluwer Law International, 1998, p. 51.

[213] According to the classification provided by Espring-Andersen, Italy belongs to the familiar welfare state that, adopted by Mediterranean countries, is characterized by high social protection only for the breadwinner and a limited provision of services by the market. The other three models are: the corporative welfare state, dominant in Continental Europe; the social-democratic welfare state, which characterizes Scandinavian countries; the liberal welfare state, dominant in Anglo-Saxon countries.

[214] Law no. 860/1950 was proposed by Teresa Noce (PCI) and Maria Federici (DC) during the sixth government led by De Gasperi.

[215] M.V. Ballestrero, *Dalla tutela alla parità. La legislazione italiana sul lavoro delle donne*, Il Mulino, Bologna, 1979, pp. 139- 145.

[216] What is possible to remark is that, in reality, the prohibition for dismissal was only temporary as, when the deadline of one year since the birth of the child expired, the working mother could be dismissed from work with a mere notice of termination.

The successive act for the Protection of Working Mothers was Law no.1204 of 1971 that, amending the previous one of 1950, established a framework for the protection of all women employed in the official labour market. The first innovation was, in fact, that it addressed women working in different fields: it applies to women providing familiar domestic services as well to women working from home. Then, the right to return to the same job for one year was strengthened (Article 2 and 4) and, in term of safety and health, it limited the use of female labour work for heavy-duty work (Article 3). For what concerns the economic treatment of pregnant workers and workers who have recently given birth, the law established a daily allowance equal to 80% of the normal salary to cover the whole period of compulsory maternity leave (Article 15).

Considering the two laws analyzed in this paragraph, it appears that Italian legal structures sought to protect working mothers in order to safeguard their role in the social function of reproduction. For this reason, given that the focus is on the social function of mothering rather than on mothers' employment rights, these provisions failed to move beyond formal equality. [217]

## 2 Influence of EU rules on Italian ones: from mere implementation to an enhanced Italian legislation

### *2.1 The Italian first answer to EC directives: Law no. 903/1977*

During the 1970s EC rules on gender equality started to have a greater influence on Italian legislation. This decade is characterized by the initial implementation of European directives, that brought big changes in the national legislation from a gender perspective as well in the social and cultural features of broad parts of Italian society. In fact, with the enforcement of Law no. 903/1977 for the Equal

[217] R. Guerrina, *Mothering the Union. Gender Politics in the EU*, Manchester- New York, Manchester University Press, 2005, p. 121.

Treatment of men and women in the workplace[218], Italy aspired to be in line with Directives 75/117/EEC and 76/207/EEC.

This law represented in Italian legislation on gender equality an important result, given that its primary aim was to leave the traditional idea of a differentiated treatment, that implied protection for women, and to realize a real equality of treatment.

The main features and innovation concern: the lawlessness to refuse to hire a woman because of marital status or pregnancy (Article 1); the establishment of the principle of equal pay for work of equal value (Article 2); the extension of the right of maternity leave to adoptive mothers (Article 6) and the introduction of the principle of parental leave for working father, if they have the sole custody of the children, or the mother has surrounded her maternity rights (Article 6 and 7).

This law does not address only to women, but to men too. Article 1 forbids, in fact, to discriminate on the basis of sex, without referring to the category of women. Nevertheless, in the light of everyday practice in which women are usually discriminated, even this law is intended for women.[219] It is important to add that such prohibition of discrimination is directed to employers of private companies, as well to public administration. Therefore, the traditional contrast between public and private work jobs was resolved and previous laws meant for the private sector, became applicable also to public one.[220]

The mentioned law presents itself as a promotional legislation. This means that the equality of treatment should be pursued not only in a theoretical way but also in a practical way, through specific measures apt to eliminate inequalities. For this purpose, legal action can be taken in case of presumed discrimination and the judge has the duty to ascertain the legality.[221]

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[218] Law no. 903/1977 was enacted during the third Andreotti government. Additionally, it is important to remember that during this government a woman, Tina Anselmi, became a ministry for the first time (Minister of Labour and Social Welfare).

[219] M.V. Ballestrero, *Dalla tutela alla parità. La legislazione italiana sul lavoro delle donne*, Il Mulino, Bologna, 1979, p. 224.

[220] The information was taken on the website:
http://www.solideadonne.org/pdf/legislazione/scheda_legge_903_1977.pdf

[221] Article 15.

The reference to fathers, which are entitled to days of leave in case of children's illness,[222] reveals its promotional nature too. In particular, it reveals the legislator's intention to promote and modify traditional parents' roles in the education and care of children[223] as well to create more specific rules, that encourages this new concept of Italian family.

In conclusion, it is possible to state that this law could represent an additional advancement through an effective equality between sexes in the workplace. Nonetheless, in this circumstance it is pursued through the direct involvement of the father in its familiar responsibilities which, until this moment, were laid exclusively on mothers.

## *2.2 From protection to the awareness of some specific measures: Law 125/1991 for Positive Actions*

According to the Italian public opinion, Law no. 903 of December 1977 that implemented the two EC Directives of 1975 and 1976, was unsatisfactory. The inadequacy and ineffectiveness of the anti-discriminatory legislation gave rise to debate among women's organizations, unions, political parties, experts and scholars, which mainly criticized its traditional approach of equality, that deals with formal equality. In their opinion, a move towards a progressive concept of equality had to be made. [224]

The crucial step forward was the enactment of Law no. 125 of 10 April 1991 respecting positive action to implement equal opportunities between men and women in matters of employment and to achieve substantive equality. It explicitly acknowledged and promoted positive actions in Article 1, referring to all initiatives finalized to remove obstacles which *de facto* hinder equal opportunities

[222] Article 7.

[223] Although this provision seems to be very innovative, it is not like that if other countries' experiences are considered. In fact, the Italian legislator draws inspiration from the Swedish example as well from the already mentioned EU directives of 1975 and 1976 EEC.

[224] In practice, while the enforcement of formal equality essentially requires the enactment of rules, substantive equality requests instead a complex strategy, involving new ideas and legal mechanisms.

between men and women.[225] Following articles regard instead the application of positive action, declaring that they are in principle voluntary and promoted by financial incentives (Article 2-3). The duty to promote positive actions falls under Public administrations, both central and local authorities, that have to implement positive action programs within one year from the Act (Article 2, Paragraph 6).[226] Then, positive actions can be ordered by the judge, when he ascertains a collective discrimination he can order a plan to remove it within a fixed term (Article 4, paragraph 7).[227] In the event the judgment is not respected, article 15 of Law no. 903/1977 applies, that foresees the suppression of discriminating conducts on the basis of sex (Article 4, paragraph 8). In practice, article 15 of Law no. 903/1977 had been rarely applied. Nevertheless, in the framework of Law no. 125/1991 the legislator, aware of the limits of such article, tried to reinforce it conferring to the Equality Adviser the legitimacy to take legal proceedings against collective discriminations, and it will be with law no. 196/2000[228] that it will be extended to every kinds of individual discrimination. [229]

These new measures are supported by significant disclosure of information requirements: all enterprises employing more than 100 employees have the duty to prepare a written report on female working conditions in all relevant aspects, such as hiring, wages, promotion, dismissal. It must be sent to the plant union representatives and to the Regional Equality Adviser and, in case of failure to do so, fines are imposed by the labour inspectorate or, in more serious cases, through the loss of state aid (Article 9). Furthermore, in the event employers, which receive state aid, are responsible for discriminatory treatment, they may lose these

[225] In particular, the definition includes an open typology of plans aimed at:
abolishing unequal treatment of women in schools and vocational training, in access to work and promotion as well during working life; favouring the diversification of female occupations, particularly through education, training and vocational guidance; favouring independent employment, managerial and entrepreneurial education; overcoming conditions and organization of work which have negative disparate impact on employees' education, career or economic treatment; promoting female work in sectors, activities and occupation where they are underrepresented , particularly in developing sectors and in posts of responsibility; favouring also, through different patterns of work, working time and conditions, a better distribution of family roles between the sexes.

[226] The compulsoriness of such disposition is a peculiarity of Italian legal system, given that at EU level voluntary and consensual interventions were preferred.

[227] T. Treu, *Labour Law and Industrial Relations in Italy*, The Hague, Kluwer Law International, 1998, p. 88.

[228] Legislative Decree on activities of Equality Advisers in the field of Positive actions (196/2000).

[229] Therefore not only for discriminations in the access to employment and for night work.

benefits and, in the most serious case, may be excluded from any aid or public contract for up to two years (Article 4, Paragraph 9). [230]

A relevant novelty of such act was the new reshaped functions of Equality Advisers, previously established following Act no. 863/1984.[231] They are appointed in all provinces and regions by the Minister of Labour, after designation by the competent regional government and consultation with the most representatives unions. Their general duty is to take all initiatives necessary for the implementation of equal opportunity legislation. Nevertheless, their new and most important power was to bring autonomous challenge to collective discriminations, as well bring cases under delegation from individual women or intervene in individual litigation (Article 8, paragraph 8). Nonetheless, despite these significant authority conferred, the role of this new figure has been to some extent weak in terms of visibility, influence and economic resources. In fact, although this body represented the key player of the whole law, it was not provided with the necessary instruments to fulfill the expectations.[232]

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[230] At a later stage, the system of sanctions was strengthened in terms of obligation thanks to the adoption of the Legislative Decree no.196 of 2000 on activities of Equality Advisers in the field of Positive actions, as it provides the obligation to deposit the sum of 51 euro into the Equality Advisers Fund for every day of delay in enforcing the judgment, as well the exclusion from any State aid or public contract not only for employers, but for all subjects which put in place discriminatory conducts (both directly and indirectly, individual and collective). This is intended as a mechanism of *extrema ratio*, as it is excluded in case of conciliation of discriminatory litigation. Despite that, such disposition has never been applied.
Therefore, some law commentators suggested to overturn this mechanism, inserting an equality clause in the procurement criteria. As a consequence, it would be possible to verify from the start if contracting companies respect the principle of gender equality.
See: G. De Marzo, M. Capponi (a cura di), *Contrastare le discriminazioni*, Consiglio Regionale della Toscana, Commissione Regionale per le Pari Opportunità, Quaderno n. 52, Ottobre 2011, pp.238-241.

[231] Act 125/1991 also reshaped the function of the Equal Opportunities National Committee (CNP), whose setting up was decreed in 1983 by the Ministry of Labour. CNP is composed of the Minister of Labour or a deputy Minister (as President), 22 voting members appointed for 3 years that include representatives of unions, employers and women's association and National Equality advisers, plus a further 11 non-voting members, 6 experts, and 5 civil servants. Its tasks include investigating discrimination cases and giving advice to the CNP and to the Equality Advisers.

[232] Also today in the practice there is the widespread tendency to resort to extrajudicial solutions: the under-utilization of anti-discriminatory provisions in Italy is directly linked with a missing sensitivity for gender issues among women too. It occurs that women do not often acknowledge discriminatory treatments, or anyway do not choose the judicial possibility for fear of additional discriminations.
On this issue see: G. De Marzo, M. Capponi (a cura di), *Contrastare le discriminazioni*, Consiglio Regionale della Toscana, Commissione Regionale per le Pari Opportunità, Quaderno n. 52, Ottobre 2011, pp.207-209.

For what concerns the concept of discrimination, it is necessary to note that until the enactment of Act no. 125/1991 it was not legally defined.[233] Such Act, instead, provides a definition of discrimination referring also to the purposes of Act no. 903 of 9 December 1977, that merely prohibited it, and it declares that with discrimination it is meant any act or conduct which produce prejudicial effects by discriminating, even indirectly, against workers on grounds of sex (Article 4, paragraph 1). Then, a definition of 'indirect discrimination' is provided, that means any prejudicial treatment following the adoption of criteria which may place workers of either sex at a proportionately greater disadvantage and which relate to requirements not essential to the performance of the work in question (Article 4, Paragraph 2).[234] Hence, in this way, the prohibition of discrimination provided in the 1977 Act, is extended to include a new definition, that includes acts and conducts. Under the 1991 Act, in fact, the prohibition of discrimination embraces any acts, conducts, omissions which produce prejudicial effects by discriminating, even indirectly, workers on grounds of sex.[235]

Law no. 125/1991 played a key role in Italian Legislation on Equal Opportunities. First of all, it appears aimed at a two-fold purpose: on one side the more concrete one is to promote female employment, on the other side there is the ideal goal to achieve substantive equality. In reality, the choice of using the expression 'substantive equality' in Article 1, represented a novelty in the Italian legislative framework.[236] In fact, the transition from formal equality to substantive equality allowed also the widening of the notion of discrimination, not anymore conceived only as direct but also as indirect.[237] Consequently, this reference to 'substantive equality' provided the legitimacy to adopt those measures, positive actions

[233] In truth, proposal to include indirect discrimination in Article 1 of Act 903/1977 was rejected by the Parliament.

[234] Cfr. M.V.Ballestrero, *New Legislation in Italian Equality Law. Act 125 of 10 April 1991 (the Positive Action Act)*, in "Industrial Law Journal", Vol. 21, No. 2, 1992, pp.152-156.

[235] This statutory definition seems very close to the notion accepted by the European Court of Justice in some cases, such as: Case C-170/84 *Bilka Kaufhaus v von Hartz* [1986] ECR 1607, Case C-109/88 *Danfoss* [1989] ECR 3199, Case C-33/89 *Kowalska* [1990] ECR I-2591.

[236] In effect, the expression 'substantive equality' was not habitual in legislator's vocabulary: it was used, in reality, only in opposition to the expression 'formal equality'.

[237] In reference to Law no. 125/1991, see: I. Milianti, L. Angelini, Comment on Article 42 of Legislative Decree 198/2006 in De Luca Tamajo, Mazzotta, *Commentario breve alle Leggi sul lavoro*, 5° Edizione, Cedam, 2013, pp. 2344-2345.

included, for its achievement, but also to reveal the necessity of a legislative approach of this kind.

Second, through this piece of law positive action was legally introduced into Italian legal system. Nevertheless, it is important to remark that Italian legislator did not provide a definition of them, but he only pointed out its finalities. The acknowledgement of positive action did clarify the legality of such instrument, but also served to receive those advancements hoped for at EU level. In the EU legislation there were two references to positive actions: the first, implicit, was contained in paragraph 1, Article 2 of Directive 76/207; the second one, more explicit, was instead in the Recommendation of the Council 84/635 on the promotion of positive action for women. Taking in consideration this legislative scenario, it is necessary to observe that the definition given by Act no. 125 of 1991 basically accepted those developed in other European system and, in particular, the one adopted by the mention recommendation.[238]

Third, it has to be declared that with this Law Italy suddenly overcame the previous merely protectionist legislation for women. Furthermore, the fact that measures provided are thought by the legislator as temporary and voluntary, shows that it is in his point of view to realize an effective equality of starting conditions and a systematic change in Italian culture, attempting to contrast those models and standards which have jeopardized its achievement.[239]

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[238] M.V.Ballestrero, *New Legislation in Italian Equality Law. Act 125 of 10 April 1991 (the Positive Action Act)*, in "Industrial Law Journal", Vol. 21, No. 2, 1992, p. 154.

[239] This new approach is included also in Law no. 215/1992 that, following the example of affirmative action, promotes female entrepreneurs through positive actions. In particular, it makes available specific funding in order to support the start-up of new enterprises as well already existing business, on the condition that management is exclusively female. It is required, in fact, that the number of women is not less than 60% or that the owner is a woman.
With the judgment 109 of 1993, the Constitutional Court issued a significant clarification on whether these measures were in line with the Constitution. It stated in fact that through these measures the legislator wanted to mitigate an obvious imbalance which led to favour men in occupying positions as entrepreneurs or business executives. Furthermore, this case law represented an important occasion also to evidence the alarming absence of women in the business sector.
On this issue, see: E. Gennari, F. Lotti, *Female Entrepreneurship and government policy: evaluating the impact of subsidies on firms' survival*, Banca d'Italia Eurosistema, n.192, June 2013, pp.6-7. The document is available at:
http://www.bancaditalia.it/pubblicazioni/econo/quest_ecofin_2/qef192/QEF_192.pdf

To conclude, in the light of the other relevant laws adopted from this moment on[240], it could be declared that law no. 125/1991 is among them the milestone, as it provides to realize an effective turning point in the legislative framework on gender equality. The law for positive actions is the one that set the change, referring to the concept of substantial equality and providing those legal instruments that, allowing in practice its attainment, remove gender differences. Therefore, even if consecutive laws issue forms of support for working mothers and fathers as well measures to combine professional and familiar life, they enhanced this normative that is become stratified over the time[241], but they implant themselves into that radical change set up by law no. 125/1991.

## *2.3 Some examples of stronger Italian legislation in comparison with EU one: Law no. 53/2000 for the support of mothers and fathers and Legislative Decree no. 151/2001*

With the beginning of the third millennium a new important issue emerged in the Italian context: the reconciliation between work and family life. The development of a body of rules on this matter was essential given that the previous legislation, too much protective, was until this moment the poorest among EU Member States.

Law no. 53/2000, that implemented EU directive 96/34/EC, aims at promoting maternity and paternity as well encouraging enterprises to invest in and support reconciliation between work and family life, and a greater balance between work, leisure and training.

Some provisions introduced by this law modified some articles of law no.1204 of 1971, and were then merged into Law no. 151 of 2001, that will be analyzed at a later stage.

[240] See, in particular, Law no. 53/2000 and Legislative Decree no. 151/2001 analyzed hereinafter.
[241] We talk of 'stratification of anti-discriminatory legislation', as it was initially characterized by general principle enshrined in the Italian Constitution and in particular by Article 37, and then has been enhanced over the time through the institution of other kinds of prohibitions, such as the ban of discrimination in the access to employment, discrimination on ground of marriage and salary.

Some interesting provisions are those concerning parental leave: in fact, as Article 1 points out, the purpose of this legislation is to issue parental leave, extended also to disabled persons parents' and to encourage greater social solidarity. Article 3[242] clarifies in a more detailed way how it applies, stating that parental leave is entitled to working mothers and working fathers and that the leave cannot exceed six months; in case of one parent, the maximum is instead 10 months.[243]

The most innovative dispositions are those contained in article 9, that disposes measures in order to combine lifetimes and working times for an increased efficiency of this law. For this purpose, it declares the possibility to provide financial assistance to companies that want to realize experimental projects in favour of reconciliation, through more flexible working hours. Four kinds of projects are allowed: first, projects realized for working mothers and fathers in order to grant them flexible working times, such as part-time reversible, tele-working, home working, 'bank-hours'. Second, training programs for the reintegration into working-life after the parental leave; third, projects allowing the substitution of entrepreneurs and self-employed workers which benefit from parental leave with other entrepreneurs and self-employed workers; fourth, interventions aimed at guaranteeing the substitution, the reintegration and the training of workers with children in chancery or disabled.

Financial assistance is granted to companies that provide positive measures for flexibility; to companies with fewer than 50 workers is instead reserved 50% of annual funding.[244] Beneficiaries of measures for flexibility are male and female workers with care responsibilities, particularly with children below the age of

[242] Disposition of Article 3 is then merged into Law no. 151 of 2001, Article 32.

[243] Other kinds of leaves are regulated by following paragraphs. In particular, Article 4 and 5 discipline leaves for particular circumstances and training. In case of death or acute disease of spouse the worker is entitled to have maximum 3 days of leave in a year. Leave for training instead could be demanded by workers who have worked in the same company or administration for at least 5 years. In such event, leave cannot exceed 11 months over the course of their entire working life.

[244] More specifically, for the first, the second and the fourth kinds of projects can get public funding companies of private law, individual or collective, local health units and Public Health Corporation. For the third kind of projects are financeable male and female entrepreneurs, male and female self-employed workers.

legal majority. Nevertheless, it is possible to extend the applicability of these measures in case of other relatives needing care, such as elderly parents.[245]

In the practice it has been observed that such funding are used above all by companies working in the field of trade and large-scale retail trade[246] due to the high number of women working part-time[247]. At present, on the score of the period of crisis that Italy is facing, projects of this kind are not financed anymore and the anti-discriminatory normative is conceived by companies as a luxury.

Law 53/2000 declares the devolvement to the government to issue a Consolidate Text, providing dispositions in this field and on this matter, through a Legislative Decree. For this reason, it is relevant to focus the attention on Legislative Decree 151/2001, as it repeals some important provisions of the previous law. The aim of this decree was in fact to consolidate the provisions for the protection of the rights of working mothers, outlining the basic statutory rights for the protection of health and safety of pregnant workers and workers who have recently given birth.

After having given a definition of different kinds parental leave in Article 2[248], the Legislative decree 151/2001 gives in the following Articles a detailed description on how such leaves apply.

Concerning Maternity Leave, Article 16 declares the prohibition to make women working during the two months before and three months after the childbirth's date. Nevertheless, Article 20 issued the Flexibility of Maternity Leave, that considers the possibility for birth mother to reduce of one month the absence from work before the childbirth, and to prolong to 4 month the next one. Nonetheless,

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[245] A. Del Re (a cura di), *Manuale di Pari Opportunità. Per un orientamento sulle politiche di genere*, Padova, Cleup, 2008, p.204.

[246] See: C. Bassanini, P. Madami, *Le scelte delle piccole e medie Aziende della Provincia di Milano per lo sviluppo di politiche di Pari Opportunità e l'utilizzo di risorse per le azioni positive*, Provincia di Milano. The document is available at: http://temi.provincia.milano.it/donne/doc/pubblicazioni/Piccole%20e%20medie%20imprese.pdf

[247] Nevertheless, part-time should not be seen as "positive". The choice of part-time by companies is not a measure of flexibility, but a way to reduce costs in this period of crisis. As a consequence, women working part-time do not progress in their career and reach with difficult decision-making positions See: Randstad Workmonitor, August 2011, available at: http://www.randstad.com/press/research-reports/

[248] More specifically, it defines the Maternity Leave as a compulsory absence from work provided for mothers; Paternity Leave is instead meant as a the absence from work for fathers, that should be taken as an alternative as to Maternity Leave. With Parental Leave it is meant the facultative abstention from work for male and female workers.

this clause applies only if the doctor of the National Health Service attests that this option does not prejudice the health of the mother and of the child.

For what concerns paternity leave Article 28 declares the possibility for working fathers, in case of death or big disease of the mother as well exclusive custody of the child to the father, to be absent from work, availing himself of the maternity leave for the resting part deserved to the mother.

In case of maternity and paternity leave are taken, both parents are entitled to have a daily allowance that is 80% of salary. Furthermore, they both enjoy the right of prohibition for dismissal: working mothers cannot be dismissed from the beginning of pregnancy until when the child is one year; working fathers which benefit of the paternity leave[249] cannot be dismissed during the leave and until when the child is one year.[250]

Article 32 of the mentioned Legislative Decree fundamentally restates what already declared about Parental Leave by Law 53/2000. In fact, it is possible to take the leave starting from the first year of the child until his eighth year. In taking maternity and paternity leave, working mothers and working fathers cannot exceed six months each one. In case of only one parent instead, the leave cannot exceed ten months. In case both leaves are taken, maternity and paternity ones, and the father exercises his right to be absent from work for a continuative or fractioned period not inferior to three months, the overall maximum is eleven months.[251]

Regarding instead daily allowances, it is declared by Article 34 that working mothers and fathers availing themselves from leave should have a daily allowance of 30% of the salary, for an overall period of six months for both parents. For the resting period, daily allowance is provided only in case parents receive a low income.

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[249] Therefore, not every father given that Paternity Leave can be taken only under certain circumstances.

[250] See: M.L. Vallauri, Comments on Articles 16, 20, 28 of Legislative Decree 151/2001 in De Luca, Tamajo, Mazzotta, *Commentario breve alle Leggi sul lavoro*, 5° Edizione, Cedam, 2013, pp. 1507-1520.

[251] Legislative Decree 151/2001 issued the possibility for both parents to jointly take leaves, diversifying itself from Law no. 903/1977, that acknowledged the entitlement for fathers to be absent from work, only if the mother gave up to her leave.
Nevertheless, the mentioned Legislative Decree does not allow the same possibility in case of sickness of the child. In this event, parents can take leaves only alternatively.

Presently, the right to Parental leave and the resultant allowance are provided also for self-employed mothers for a three-months period in the first year of child's life for children born since the first January 2000.

In the view of the analysis made to Law no. 53/2000 and to Legislative Decree no. 151/2001, it is possible to remark that these legislations put Italy in a favourable position in comparison with Europe.

The first aspect to be observed is that such legislation issued a new figure of working parent, consequently equating working mothers and working fathers for what concern both protection and opportunities.

Secondly, this legislation does not look anymore at maternity as a necessary period for its physiological function, but as a part of child's life in which the role of fathers is equally needed as the role of mothers.

Hence, if until this moment Italy was not at the first place for providing promotion and support for maternity and paternity, with these legislations Italy seems to be in line with EU Member States. In effect, as already declared before, with Law no. 53/2000 Italy incorporates some relevant EU rules on parental leaves, given that its primary aim was to implement EU Directive 96/34/EC of 3 June 1996. What is necessary to remark is that Italy went still beyond what required by the Directive. The directive declared that parental leave should be last at least 3 months, while Italian law allows instead 10 months, and there is also the possibility to rise the leave to 11 months if certain conditions are met.[252]

Taking in consideration these good points, it is fundamental to note that the Italian solution was far from being merely receptive: Italy realized an innovative, well-advanced legislation in the matter of parental leave and was able to enhance strong points of such legislation. For instance, the extension to eight years as the maximum age for taking Parental leave as well the predisposition to reduce differences between working father and working mothers show the willingness of Italy to improve and exceed those minimum standards provided by EU rules. [253]

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[252] In reality Directive 2010/18, that repealed the 96/34/EC one, stated that the minimum requirement for Parental leave was 4 months. Therefore, Italy went beyond also to this Directive, that has been adopted ten years later than the Italian law.
For a complete analysis of this Directive see Paragraph 1.11.

[253] Cfr. C. Lensi, *Lavoro, Maternità, Congedi Parentali*, 2003. The document is available at: http://www.provincia.pistoia.it/

## 3. Code of Equal Opportunities between Men and Women (Legislative Decree no. 198/2006)

In view of the *corpus iuris* adopted by the Italian legislator since the 1990s, the Code of Equal Opportunities between men and women, enacted through the Legislative Decree no.198/2006[254], was designed to realize a single legislative document, in which all relevant laws in the field of Equal Opportunities are incorporated. It tries, in fact, to put in order the fragmentary legislation in this matter, mainly represented by Law no. 125/1991 for positive actions, Law no. 903/1977 on the equality of treatment between men and women in the working place.[255]

In book three, that is the one that concerns the equality between men and women at work, it is made clear what it is intended with discrimination, providing a quite broad definition.[256] It remarks that discrimination includes every conduct that has negative effects on women who have been discriminated directly or indirectly for gender reasons. Nevertheless, direct discrimination is easier to identify, given that it is possible to observe when a explicit differentiated treatment is applied to women and not to men. In case of indirect discrimination, instead, apparent neutral conducts are put in place, but that concretely provide a disadvantage to workers of one sex or other sex. In article 27, the Legislator made an exemplifying attempt to list all kinds of discrimination that can occur in all phases of working life and post-working life of a worker. For instance in the access to the labour market, with reference to marital status or concerning remuneration.

In following articles, the Code for Equal Opportunities absorbed also those provisions in the matter of positive actions, as well benefits for the creation and

[254] Legislative Decree n.198/2006, adopted on the eleventh April 2006, is composed of 58 Articles contained in three books, that are: "La promozione delle pari opportunità tra uomini e donne", "Pari opportunità tra uomo e donna nei rapporti etico-sociali" and "Pari opportunità tra uomo e donna nei rapporti economici".

[255] The Code for Equal Opportunities between men and women includes in fact: Law no. 132/1985, Legislative Decree no. 303/1999; Legislative Decree no. 266/2003; Law no.125/1991; Legislative Decree no. 196/2000; Law no. 215/1992; Law no.154/ 2001; Law no.903/1977; Law no. 66/1963; Legislative Decree no. 24/2000; Law no. 7/1963; Law no. 90/2004.

[256] Article 25.

development of female entrepreneurship. Article 42, in dealing with positive actions, immediately stresses the aim of supporting female employment and guaranteeing the achievement of substantive equality, as well who could be promoters of positive actions.[257]

Despite the primary aim of the Code of Equal Opportunities between men and women was exactly the unification in a single text of many relevant laws enhancing national legislation on equality of opportunities, some criticism on the relevance of this text have been expressed. The main criticism on Book III of the Code is that it merely realized an essential transcription of leading provisions in the field of equality of men and women in the labour market. The sole instrument provided is in fact the one of positive actions, whereof a definition is not provided, but the focus is only on goals. Therefore, in this way it completely omitted all recent developments at EU level, in particular the approach of gender mainstreaming that Italy adopted after the Conference held in Beijing.[258]

Furthermore, this Legislative decree realizes a confusing reorganization of previous norms too, which had at the time of adoption an own coherence in defining the notion of direct and indirect discrimination, as well the individual and collective judicial actions, available by the Equality Advisers.

Few months after, the Recast Directive 2006/54/EC was adopted at EU level by the European Parliament and the Council with the intention of repealing all existing directives and of creating a single text in this matter. On this occasion, for the transposition of Recast Directive, Italy amended Decree no. 198/2006 and tried to create a more detailed text overcoming all omissions of the previous one.

[257] As already declared by Article 1 of Law no. 125/91.

[258] Italy impletemented this strategy through the Directive Prodi – Finocchiaro, D.P.C.M. "Azioni volte a promuovere l'attribuzione dei poteri e responsabilità alle donne, a riconoscere e garantire libertà di scelte e qualità sociale a donne e uomini", adopted on the 7th of March 1996.

## 4. Legislative Decree 5/2010: the transposition of the Recast Directive (2006/54/EC)

The Legislative Decree no. 5/2010 of 25 January was enacted in order to implement the Recast Directive 54/2006 adopted at EU level. The Decree was adopted some months after the deadline, that was by 15 August 2008, but finally ensured an overall positive accomplishment of this task.[259] In reality, as remarked in the previous paragraph, Italy had already realized a single text on gender matters, even if with relevant gaps; sometimes instead domestic legislation had gone even further than EU law in this regard.

In amending the Code for Equal Opportunities between men and women, the Legislative Decree no. 5/2010 enhanced its general purpose. Article 1 of Book I refers in fact not only to the prohibition of discrimination, but also to gender mainstreaming, declaring that the purpose of equality of opportunities shall be observed in all fields, as well in policy making and in the implementation of laws, regulation, administrative provisions, policies and activities at all levels and by all actors. The ban of discrimination is still repeated in Article 25 of Book III; nevertheless, in the new paragraph 2bis all those less favourable treatments for reasons of pregnancy, as well maternity and paternity, adoption and foster care were included among causes of discriminations.[260]

The mentioned legislative decree reinforced the principle of equality, associating its infringement with harsher penalties.[261] In case a mandatory judgment attests a discriminatory conduct, the infringement of the Decree or of the judgment of the Court is punished with a penalty up to 50.000 euro and the detention up to 6 months.[262] Additionally, new Article 41bis guarantees judicial protection for

[259] See: S. Burri, H. van Eijken, *The transposition of Recast Directive 2006/54/EC*, European Network of Legal experts in the field of gender equality, p. 86-92. The document is available at: http://ec.europa.eu/justice/gender-equality/files/recast_update2011_final_en.pdf

[260] The added paragraph 2bis is inspired by Article 2, Paragraph 2 (c) of the Recast Directive, given that it does not literally reproduce the text, but it broadens its contents.

[261] Information has been taken on the website: http://www.ilsole24ore.com/art/SoleOnLine4/Economia%20e%20Lavoro/2010/02/lavoro-codice-par-condicio.shtml

[262] Before the adoption of the Legislative Decree no. 5 of 2010, gender discriminations were sanctioned through a fine arranged by Article 41 of the Code for Equal Opportunities (198/2006) from 103 euro up to 516 euro.

victimization. It occurs when conducts against people subject to discrimination or other persons take place, as a reaction to complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment. Furthermore, a very broad transposition of article 24[263] of the Recast Directive was provided. In fact, judicial remedies provided by the Code have been extended to employees and to all other persons who are victims of detrimental treatment by their employers in reaction to obtaining compliance with the principle of equal treatment between men and women.

For what concern omissions and issues not particularly enhanced as expected, there is firstly the reconciliation of work, private and family life. Although Italian Legislation ensures a good level of conciliation of private and family life and important laws enacted provided important measures for its promotion, the Decree does not mention reconciliation.[264]

Secondly, regarding the definition of the concept of pay that was not defined by Italian legislation, such Legislative decree not even provides one. Actually, it has slightly rephrased art. 28 of the Code of Equal Opportunities that forbids pay discrimination. Given that the reformulation of the rule does not involve substantial changes, one would have expected that the prohibition concerning equal pay would have been technically improved by an express reference to all aspects and conditions of remuneration.

At last but not least, for what concerns positive actions no substantial enhancements were registered. Nevertheless, it is important to remark that Italian Legislation already fulfilled the requirement of the Recast Directive. In fact, the mentioned Legislative decree repeats those provisions regarding finalities,

[263] That is the Article that concerns victimization.

[264] It should be stressed that, in 2009, the Charter for Equal Opportunities and Equality at Work was launched by the Minister of Labour and the Minister of Equal Opportunities and, signed by companies of all sizes. It is a voluntary instrument of active policies for the diffusion of an inclusive corporate culture, in order to achieve an overall well-being in the workplace. In this framework, a practical guide has been adopted, whose name is 'Bussola per le PMI. Un aiuto all'orientamento delle problematiche delle pari opportunità delle pari opportunità e delle diversità'. This guide plays an important role for the reconciliation of private and work-life and for the concrete application of principle of equality, as it proposes a practical approach through best practices and tests in order to apply the different points of the Charter.
As a consequence, different companies presented some kinds of innovations, such as the creation of the Diversity Manager, solutions of job-sharing, positive actions for young women, projects for a better reconciliation, promoting strategies of business welfare.
See: http://www.lavoro.gov.it/ConsiglieraNazionale/Documents/20120801CPOBussola.pdf

promotion and funding of positive actions as already ordered by Law no.125 of 1991. Additionally, such Legislative Decree deals also with positive actions in public administrations,[265] declaring in article 48 that public administration adopt a plan for positive actions. Therefore, in the phases of recruitments and advancements, in case a man is chosen instead of a woman a specific and suitable motivation is required. Also in this case, the obligatory nature of this article is made evident by the point that sanctions are provided in case of non-compliance, and in particular, it is prohibited to recruit new staff, including those with legally protected status.[266]

## 5. The effectiveness of Italian anti-discriminatory legislation

Italian legal order is characterized by rules of high quality in the field of gender equality at work, that improved over the time legal instruments in order to achieve considerable results both for what concerns the defense of rights and with reference to institutional competences. Nevertheless, it has been observed in practice low effectiveness standards, due to the inadequacy of judicial remedies to remove prejudges and well-established cultural behaviors which jeopardize the efficaciousness of laws. In practice, it is ascertained a small number of judgment in the matter of anti-discriminatory legislation. Hence, one could suppose that Italian working context is substantially positive for what concerns the parity between men and women and that the recourse to legal action is unnecessary. But actually, there is a low female employment rate and a wide horizontal and vertical segregation that characterize Italian labour market.[267]

Furthermore, Italian judicial rules against discriminations on grounds of gender are very articulate and complicated, and have therefore created a disorganized legislative stratification.

[265] Legislative decree no. 5 of 2010, in dealing with positive actions in public administrations, refers to Article 7, paragraph 5 of Legislative Decree no.196 of 2000.
[266] As declared by Article 6, Paragraph 6 of Legislative Decree no.165 of 2001.
[267] Cfr. G. De Marzo, M. Capponi (a cura di), *Contrastare le discriminazioni*, Consiglio Regionale della Toscana, Commissione Regionale per le Pari Opportunità, Quaderno n. 52, pp.258-264.

It has been already remarked in previous paragraphs that in the face of the non-application of Article 15 of Law no. 903/1977, that provided the repression of discriminatory conducts, a radical change was thought as necessary. As a consequence, Italian legislator enhanced this article with the adoption of Law no. 125/1991, applying it to all kinds of individual discrimination, and giving to the Equality Adviser the legitimacy to bring autonomous challenge to collective discriminations. Then, an attempt to reorganize gender equality provisions was made through the Code for Equal Opportunities, that nevertheless fail in attaining its purpose and, for what concerns judicial remedies, it has been registered a confusing intervention. Laws no. 53/2000 and no. 5/2010 are significant on the effectiveness side, as the first one allows instruments for the support of mothering and fathering, while with the second one there is a relevant worsening of penalties in case of non-compliance with the judgment.

As regards the jurisprudential review, it remarks that there is not always a complete coherence with what disposed by the law. During the nineties the first jurisprudence on this matter was enough fragmented, due to the fact that it was an absolute novelty for Italian legal system. Judgments of this period revealed on one side a resistance to these new legal instruments, and on the other side a brave action, but not always rigorous.[268] The jurisprudence of the third millennium is certainly richer and more articulate, thanks to the enhancement of the Equality Adviser, who assured support and assistance to victims of discrimination and has been much active before the court too.[269] In more recent judgments, instead, it is possible to observe a greater ability to manage procedural anti-discriminatory instruments.[270]

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[268] It is important to mention some relevant opinions given in judgments of this period: according to the Pretura of Lecce's opinion of 13.12.1997 the judge has to investigate if in a similar situation the employer would have had the same conduct toward a male worker; if the answer is negative there is a discrimination. According to the judgment of the Pretura of Turin of 4.12.1991 a business agreement that guaranteed only to working mothers and not to working fathers a financial contribution for nursery fees was directly discriminating. This attitude confirms the bidirectional nature of anti-discriminatory norms.

[269] Nevertheless, in a judgment of the Tribunal of Rome (Trib. Roma, 25.1.2001) it was declared inadmissible an applied of urgency by means of the intervention *ad audivandum* of Equality Adviser. According to the judge, the intervention would have been admissible only autonomously, given that it had already been a similar protect procedure and it would have certainly brought to *impasse* situations.

[270] According to the Tribunal of Milan (Trib. Milano, 27.94.2007 a dismissal for the fact of being mother and not pregnant is discriminating where proof of the contrary is not provided by the

The importance of Law no.125/1991 has already been stressed as it, among laws adopted in Italy with regards gender equality at work, is certainly the most relevant, since it set the change for the practical attainment of substantive equality. Despite its weaknesses especially as concerns the Equality Adviser, for whom one would have expected an enhanced figure as keystone of positive actions, this law leaded the way to other acts on gender equality. In fact, it is in the wake of Law no. 125/1991 that the first law dealing with quotas was adopted in 2011.[271] Law no. 120/2011 introduce a quota system for the appointment of managing directors of listed companies, mobilizing also State-owned or State-controlled companies. It represents an important moment in the Italian legislation on gender balance as, in ten years, about ten thousand women, among council members and mayors, should merge in publicly owned companies. It is with this law in fact that Italian legislator takes charge of the fact that women are mostly absent from boards of directors of listed companies and from the world of business in general, and finally realize an act that has itself the ambitious target of fully implementing the principle of substantive equality.

## 6. The issue of 'women on boards' in the Italian Legislative Framework

The relevant matter of 'women on boards' already analyzed within the EU context in the previous chapter, was dealt in Italy through the enactment of law no. 120/2011 adopted in July 2011, that mandates the temporary increased representation of female on boards of publicly listed companies.

This law is receiving considerable attention in Europe: until this moment the reference country for analyses on the implementation and on the impact of gender

accused. In case no.179 of 15.02. 2011 the Tribunal of Florence accepted the complaint that, proposed by the Equality Adviser of Tuscan, was deemed discriminating as the municipality of Florence denied, due to a wrong interpretation of the contract, an award for productivity to working mothers absent from work.

[271] Actually, it is in the sphere of the direct election of the mayor and of members to the Chamber of Deputies that, with the adoption of Act no. 81/1993 and Act no. 277/1993, the mechanism of quotas was tested for the first time as a means of favouring a rebalance of the representation of sexes.

quotas in boards has been Norway; nevertheless, from now on the Italian experience will provide a new benchmark to explore. The case is particularly interesting as Italy is the leading country among 'familialistic' welfare states, which only in the recent past has tried to overturn its traditional protective model. Hence, such law on gender quotas is deemed the first clear intervention in Italy in the area of gender equality and, consequently, the leading step in the direction of reaching a gender-balanced process of decision-making.

## *6.1 Law 120 of 2011*

Act no.120 of 2011, entered into force on the 12th August 2011, aims at increasing the number of women present on administrative and controlling bodies of listed companies set up in Italy on regulated markets and of state-owned non-listed companies.

Specifically, Article 1 declares that the boards of directors, management boards consisting of not fewer than three members and the board of statutory auditors of companies, for three consecutive terms must be formed in such a way to ensure gender balance. Article 2 points out that this criterion, that applies for three mandates consecutives, becomes effective at the first renewal of boards after one year from the date the law first comes into force. Nevertheless for the first of the three mandates, the gender balance prescribed by the law means that a fifth of the places must be reserved for the gender with the least number of representatives; whereas, for the second and third mandates, this quota goes up to one third. Additionally, the law arranges that the statute of companies has to be the first to be adapted to new regulation. They are, in fact, obliged to regulate the way the lists are formed and in case of replacement during a mandate, they must guarantee compliance with the gender balance criterion provided by the law.

Article 3 deals instead with the subjects of such regulation. It applies in fact not only to listed companies on regulated markets, but also to state-owned non listed companies, in particular companies where government agencies hold the majority

of votes, or are able to exercise a dominant influence due to the sufficient votes at their disposal or specific contractual restrictions. [272]

For what concerns the sanctioning system, rules and above all entrusted authorities differ between listed companies and state-owned companies.

Regarding listed companies, Article 1 foresees that the National Securities and Exchange Commission (CONSOB) warns the company involved to comply with this criterion within a period of a maximum four months.[273] In case of non-compliance, Consob issues a new warning which comes with a fine ranging from a minimum of 100.000 euro to a maximum of 1.000.000 euro.[274] In the event of persistence in failing to comply by not reaching to the second warning within the following three months, the law states that the appointment of every elected member will be invalidated.

More specifically, through Resolution 18098 of 8 February 2012[275], Consob provided an act with which delegated to the corporate statute the implementation of the regulation concerning the composition of list of candidates. The Resolution specifies that lists that present at least three candidates must contain a certain percentage of the less-represented; instead there is no provision for gender allocation for lists containing fewer than three candidates. The statute must regulate also way members, whose mandate lapses during the term of office, providing that they are replaced and respecting even in this case the gender balance. [276]

Additionally, another resolution adopted by Consob[277] focuses on companies which submitted application to be admitted to listing, stressing that they have to conform in the composition of their boards and that full compliance regarding the

[272] In accordance with Article 2359, paragraphs 1 and 2 of the Civil Code.

[273] Consob, that is an indipendent regulatory body already provided for under Italian law, has been called to define, by means of regulation to be adopted within six months of the Act coming into force, matters regarding violation, application and abidance of the norms governing gender balance, and in order to do so to determine the procedure to be adopted.

[274] An additional financial penalty provided by law concerns the composition of Boards of Statutory Auditors, whose fines in case of violation may range from a minimum of 20.000 euro to 200.000 maximum.

[275] The document is available at: http://www.consob.it/main/documenti/bollettino2012/d18098.htm

[276] P. Profeta, L. Amidami Aliberti, A. Casarico, M. D'Amico, A. Puccio, *Women Directors. The Italian way and beyond*, Palgrave Mac Millan, 2014, p. 155-157.

[277] Communication 0061499 of 18 July 2013, available at: http://www.consob.it/main/documenti/bollettino2013/c0061499.htm

members of the boards is delayed to the first renewal of corporate boards after that time.

With regard to state-owned companies, it is possible to remark that legislative rules provided are quite scarce. The mentioned law declares that they are subject to governmental regulations to be adopted two months after the entry into force of the law. Nonetheless, it did not expressly provide for supervisory measures for gender balancing and it did not directly charge or nominate any authority with supervision. In reality, taking into account that there are different types of state-owned companies falling under the mentioned Act and different procedures for the election of the members of corporate bodies, Act 120 of 2011 merely states that the corporate statutes have to ensure that gender balance on corporate bodies under a collegial system is in compliance with law. In particular, the statutes must establish that in cases corporate boards are appointed, a voting system based on an electoral list must apply and the formation of such list must be in compliance with gender balance regulations. Also in case of state-owned companies, if the lists present fewer than three candidates it is not possible to provide for compliance in the matter of gender balance. Then, similarly to listed companies, it is required that rules allowing for the substitution of board members respect the gender balance as laid down by law.

About one year after the entry into force of Law no.120, a decree of the President of Republic was enacted[278] and it contains additional suggestions on surveillance and monitoring modalities. More specifically, Article 4 disposes that the responsibility for ensuring compliance of state-owned companies with the law lies with the Head of Government and the Minister for Equal Opportunities, as well companies must notify to them the composition of corporate bodies within 15 days of appointment and any changes during the course of a mandate.[279] They have also to notify if there is any situation not conform to law. In this circumstance in order to establish a system of supervision, paragraph 4 of the

[278] Decree of the President of Republic n. 251 of 30 November 2012. The document is available at: http://www.pariopportunita.gov.it/images/stories/documenti_vari/UserFiles/Il_Dipartimento/20130129DPRQuoteRosa.pdf

[279] In monitoring the compliance with the law, the Department of Equal Opportunities is supported by a Working group established for three years under legislative decree of 12 February 2013. It is composed by three people of proven professionalism and expertise in corporate matters and experienced in matters of gender balance.

same article provides that 'anybody that is interested' can denounce the absence of gender balance on boards of state-owned companies.

Furthermore, the Prime Minister or Minister for Equal Opportunities shall present to Parliament a three monthly report on the status of the implementation of the norms, in order to verify if the Act is able to produce hoped-for results.

Paragraph 5 foresees that in case of non-compliance with act 120, the same institutions already mentioned warned the company to restore a situation of legality within sixty days. It has been remarked that in case of state-owned companies the period given is shorter than listed companies[280], owning to the less complex procedures adopted for the appointment of boards of directors and supervisory boards. Then, in the event of failure to observe the warning another term of sixty days will be set; nevertheless, in case of further non-compliance there will be no financial penalty. This choice, that differs from the one provided for listed companies, was justified referring to the fact that there is no provision in the law that expressly provides for fines for state-owned companies for this type of non-compliance. In the event of dissent after the second warning too, members of the relevant corporate boards should abandon office and provision should be made for the reconstitution of the board in accordance with the terms of law and statute.

Another difference between state-owned and listed companies concerns the beginning of application of law. The same presidential decree arranges in fact that state-owned companies are required to guarantee compliance with gender balance for the three consecutives mandates starting with the first renewal of corporate bodies after the coming into force of the Act. Hence, also in this case as for the absence of financial penalty too, state-owned companies are mostly favoured, given that the new conditions come into force at a later data than for listed companies. [281]

[280] That is instead of 4 months as already said before.

[281] Due to the fact that the Decree of the President of Republic entered into force on the 12th of February 2013.

## *6.2 The Iter Legis of Act 120/2011*

The current law no. 120/2011, known as 'Law Golfo – Mosca' was proposed at an early stage in 2009, when three bills of similar content were proposed in the Chamber of Deputies and in the Italian Senate.[282] All these bills were aimed at focusing attention on the principle of substantive equality, as established by Article 3, paragraph 2 of the Italian Constitution. This provision, in fact, legitimizes the adoption of affirmative action in order to remove those obstacles that restrict the freedom and equality of citizens and that prevent the realization of that equality established also in paragraph 1.

What is at first necessary to stress is that these bills originated from the initiative of different political parties. This fact is important to show that the absence of women from decision-making bodies in the economy is an objective and alarming reality in spite of the political point of view adopted when approaching this subject. In fact, according to those who promoted a legislative intervention on this matter, the under-representation of women penalizes not only women, which may by the way bring important skills and talents, but also the potential economic development of the country in general.

Considering that the third bill was incorporated into the approved one, the two resting bills were presented to the Chamber of Deputies and submitted for judgment to the 'Finance Commission', that has deliberative powers. This Commission conducted an in-depth legislative inquiry to fully understand the implication at a constitutional and corporate level of the provision under deliberation and for this purpose requested that experts in the matter, both men and women, were to be heard.

Nevertheless, although the bill received the support of major political parties, it is important to emphasize that its path through the Senate was retarded and several amendments were made. The most relevant ones are those suggested by the government. First of all, the substitution of the disciplinary measures, that demanded the invalidation of the board, with the imposition of fines on companies

[282] Bill no. 2426 was proposed in May 2009 by Hon. Golfo, no. 2956 presented in November 2009 by Hon. Mosca, and no. 1710 was presented by Hon. Germontani in July 2009.

defaulting. Secondly, the government proposed that the goal to achieve a better gender balance should be pursued gradually, step-by step. Therefore, the modification suggested to reserve for the less represented gender a quota of places equal to one-tenth during the first mandate, one fifth during the second mandate and finally one third, but not till the third mandate. Actually, it was proposed also to postpone the enforcing of the act by an year with effect from the date the act came into force, instead of six months originally foreseen. [283]

Although the amendments to the bill proposed were strongly criticized by the Commission, the faced difficulties did not weaken the political will or the initial enthusiasm to approve the common text of a bill.[284] In fact, following an initial phase of delays the parliamentary group managed to find a compromise between the position taken by the government with its amendments and that of the Senate. Nevertheless, if the proposal to postpone the enforcement by a year after entering into force of the Act was accepted, a different time frame was suggested and a sub-amendment was presented, that arranged a initial quota of one fifth and a second one of one third. This new time frame gave however rise to the main objections during its legislative process.[285]

At the final point, the bill was approved by the Senate on 10th March and then returned to the Chamber of Deputies, where it passed with a large majority. Act 120 was published in the Official Gazette on 28 July 2011 and came into force on 12 August 2011.

[283] Information was taken on the website: http://banchedati.camera.it/

[284] P. Profeta, L. Amidami Aliberti, A. Casarico, M. D'Amico, A. Puccio, *Women Directors. The Italian way and beyond*, Palgrave Mac Millan, 2014, p. 151-152.

[285] On the day the parliamentary vote was foreseen, the 8th of March 2011, the government expressed a negative opinion on the subject this amendment. Hence, voting was postponed in order to avoid a possible conflict between government and Commission.
Nevertheless, it probably happened that government appreciated this accommodating position, given that it softened its own position in favour of sub-amendment.

## *6.3 Constitutional issues. The problem of compliance with Italian Constitution*

Since the moment Law no. 120 was submitted to the Parliament, it received several disapprovals, above all in relation to its compatibility with the Italian Constitution. More specifically, it was stressed that such regulation damaged the right of economic initiatives as well the right of shareholders to own private property, and the principle of equality.

Regarding the first criticism, it is important to underline that the right of economic initiatives is allowed by Article 41 of the Italian Constitution. It specifies that such freedom may not be enjoyed if in contrast with 'social utility' or anyway detrimental to safety, liberty or human dignity. Furthermore, the law can determine programs aimed at encouraging a social responsibility in public and private enterprise. In fact, in order to guarantee a social function even the right to own property, safeguarded by Article 42, could be restricted by law. For all these reasons Law 120 has been considered in compliance with such Article.

In this context it should be not underestimated the fact that for several years the European Union recommended to Member States to encourage a better gender balance in corporate positions of responsibility, as well the European Parliament openly approved the decision of the Norwegian government to increase the number of women on the boards of private and public companies to 40%, and therefore encouraged Member States to take initiatives as a positive example.

For what concerns the principle of equality established by Article 3 of the Italian Constitution, according to the objections it is violated by such law due to its strong means that directly affect the composition of the corporate boards. Nevertheless, it must be said that, on the contrary, Law 120 aims at implementing the principle of equality, especially the one of susbstantive equality, as sanctioned in paragraph 2 of Article 3. For this purpose, in fact, the law requires that the State removes obstacles impeding the full development and effective participation in the political, economic and social organization of the country.

In this context, it has been discussed if Article 3 together with Article 37 of the Italian Constitution are able to allow the adoption of such measures, like those

provided by Law no.120. These measures are in fact of strong kind and, even if they are formulated in neutral terms in order not to explicitly favour women, and they are intended as automatically granting a result.[286] Nevertheless, such 'strong' measure is limited from its temporary nature: act 120/2011 is, in fact, legally binding only for three consecutive mandates. The temporal restriction of this measure foreseen by Law 121 reveals important aspects. It reveals the aim to undermine the systems that prevent women from accessing leadership roles in companies, and once such goals have been achieved, companies will choose how to ensure the endurance of gender balance over the time. Additionally, the temporary nature is the feature that legitimizes the adoption of measures for the gender balance, even if they are intended as automatically granting a result. It is for this reason that Article 37 can legitimize the adoption of such measures, that grant a result, but on condition that they do not are permanent. [287]

In conclusion, the temporary nature of Act 120 of 2011 is the factor that most of all allows the initiative to be compliant with the Italian Constitution.

## *6.4 The current debate around Law no. 120/2011 in the Italian business world*

Law no. 120 of 2011 above analyzed, that *de facto* introduces 'pink quotas', has arisen a wide debate not only in the Parliament during the legislative procedure that brought to its enactment, but also among Italian enterprises and in the business world in general.[288] Opinions diverge widely, but the majority agree on

[286] Actually, this kind of measure seems not to be in harmony with principles established by the Constitutional Court in the decision no. 422/195. The Constitutional Court declared that 'those measures that automatically grant a result, instead of concretely removing those obstacles that prevent women from accessing leadership roles, are not coherent with goals of Article 3, paragraph 2 of the Constitution.

[287] C. Siccardi, *Le quote di genere nei consigli di amministrazione delle società: problematiche costituzionali*, in "Associazione italiana di costituzionalisti", n.3, 2013, pp. 9-11.

[288] Some of companies called to renew their board of directors are Luxottica (1 woman in the board of directors), Unicredit (2 women), and Seat Pagine gialle (none). Then, 50% of listed companies and several state-owned companies have only men in their boards of directors. Nevertheless, it is possible to distinguish some others that have 25% of women, such as Cir and Cofide.

The information was taken on the website:

the fact that without a change of approach, it is not possible to carry into effect a real gender balance.

The reaction of influential business people, such as the heads of the largest Italian banks was positive. Monte dei Paschi di Siena is explicitly in favour of temporary legal measures for quotas of women directors on boards. Federmanager, that is an association representing active and retired industrial manager for companies of all sizes, supported affirmative action giving women with the right professional profile a temporary advantage in gaining access to seats in company boardrooms.[289] On the contrary, Confindustria, Abi, Ania officially demanded to the Senate to modify the text of Law 120/2011. Nevertheless, they did not simply make pressures and lobbying, but they sent a letter to the President of Finance Commission, directly demanding to make law less cogent and the implementation of quota more gradual.[290]

It is important to remember that Italy, with law 120/2011, anticipates EU Institutions on the matter of gender balance on boards. The quota foreseen by Italian regulation is inferior than the one provide by the EU proposal, analyzed in chapter 2. Nevertheless, on some aspects the Italian law seems more rigorous[291]: it should be considered that it does not distinguish between non-executive and executive directors; it does not provide the possibility to justify the non-achievement of quota, as the EU proposal does if certain conditions are met.[292]

Furthermore, Confindustria gave its opinion also in relation to the EU Commission proposal of women on boards, which opinion is relevant also to understand its attitude toward gender quotas. According to Confidustria, in fact, the goal of gender balance should be pursued at EU level through self-regulation of enterprises, a soft-law act and consequently, not providing for sanctions.

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http://www.geniodonna.it/index.php?option=com_content&view=article&id=601:quote-rosa-nei-cda-prime-reazioni-&catid=66:generale&Itemid=166

[289] In this context Federmanager launched the project 'Women's leadership', aimed at training and increasing skills of women that are going to be part of boards, as well those that are going to reach higher positions.On this issue see: http://www.federmanager.it/Gruppi_Federmanager/Minerva/Women_s_Leadership/Women_s_Leadership

[290] "Corriere della Sera", M. Iossa, *Quote rosa, i dubbi delle imprese*, 16-02-2011, in: www.cnel.it

[291] "Il Sole 24 ore", S. Rossi, "*L'Italia anticipa la UE sulle quote rosa nei vertici societari"*, 3-12-2012.

[292] See p. 60.

Despite conflicting opinions, the Golfo – Mosca law has shown positive results even in 'the limbo period', that is the lapse of time between the publication of law on the Official Gazette and its entry into force. During this period a group of well-informed shareholders decided to anticipate the law and opened the doors of boardroom to women in 2012.

Figures show an evident positive result, given that companies whose boards were due for renewals had in fact less than 7.8% female directors, when the average of the total listed market, at the start of 2013, was 11.6%.[293] Nevertheless, it is important to add that among eighty companies that renewed their boards in spring 2013, Consob has intervened with the first warning only in two cases.[294]

In conclusion, it is necessary to acknowledge that the adoption of Act 120 of 2011 stands as an important milestone: it does provide a unique opportunity for the country, as it should be considered not only as an issue of rights, but also as a matter of business. Having a more balanced presence of men and women in the economy and in decision-making positions is an essential ingredient of development, growth and business. For all these reasons, it is expected that such law will represent a chance for Italian business, as well a model to copy all over the world.

[293] P. Profeta, L. Amidami Aliberti, A. Casarico, M. D'Amico, A. Puccio, *Women Directors. The Italian way and beyond*, Palgrave Mac Millan, 2014, p. 186.

[294] Warning of non-compliance has been adopted against Ternienergia and Banca Intermobiliare.

# Chapter 4

## *Gender equality implementation. The effectiveness of EU and Italian policies in the Italian context*

The analysis of the legal framework for gender policies, realized with a specific focus on EU and Italian contexts in previous chapters, served as point of departure for the examination of the current gender equality situation in Italy, in order to appraise if the analyzed normative have brought the expected results. For this purpose, this chapter deals, on one side, with those good examples of positive actions and best practices set in the matter of work-life balance by a large Italian company, and on the other side with the overall situation in which the majority of Italian companies find themselves.

The chapter will be organized in two main parts: after having defined the principal work-life balance instruments, a case study of one big Italian company, Telecom Italia, is provided: the first part shows, in fact, the evidence of its initiatives realized at business level in order to implement the goal of gender diversity in the management of human resources and it will be discussed if in such case tangible improvements are achieved in the business activity in general. The attention is also focused on the early outcomes of binding instrument adopted by the Italian government, examining the direct consequences on the considered company's performance and on its corporate welfare.

The second part reflects, on the contrary, the current situation observed by the economic fabric of Italy in terms of gender balance, where small and medium-sized enterprises represent a major and essential part of the production market.

The research methodology used is different for each case: for the Telecom Italia group, a questionnaire realized for the goal of this study was made available to the company's human resources area, whose answers represented the main material for an assessment of attained achievements[295]. For what concerns small business, a direct contact with the Vice Secretary General of the Chambers of Commerce of Pisa was established[296]. Being charged of dealing with services and promotional activities addressed to enterprises of all sizes, her contribution was essential to have a concrete idea of the level of gender equality fulfilled by the plurality of companies.

The purpose of this study is, without any claim of completeness, to stress, on one hand, the general concrete situation of Italy on gender equality, despite the good level normative adopted up to now; on the other hand, to describe and to demonstrate which have been the results obtained by a particular Italian company thanks to a better integration of women into corporate lives, and in particular to understand which kind of practice could be used as a pattern from other companies in the present and in the future.

## 1. Work-life balance instruments

Before going into the content of this chapter, it is necessary to focus on those instruments that a company can use in order to further a better reconciliation between professional and work life. Always more companies choose in fact a strategy of corporate welfare, that is meant as the set of benefits and services provided by companies to employees in order to improve private and working life. This classification is an attempt to provide a complete framework of possible organizational and management instruments available to all stakeholders.

It is possible to distinguish four macro-areas, in which initiatives could be taken. First of all there are temporary instruments, that allow a greater flexibility of

[295] The questionnaire was filled in date 11.12.2014.

[296] The chosen instrument is the telephone interview, that took place on the 29th of December 2014.

working hours. Among them, part-time[297] is certainly the most common as it foresees a lower amount of working hours in relation to the full time; *orario scorrevole* gives instead the possibility to the worker to vary time of entry and of exit as well the time of break, guaranteeing at the same time the number of daily working hours foreseen by the work contract; *settimana concentrata* that consists in concentrating weekly working time in less than five days, lengthening the daily amount of hours. It is necessary to include in temporary possibilities also the maternal and paternal leave, that was widely analyzed in chapter 3, the bank of hours and the job sharing. With the bank of hours the company fixes a grand total quantity of hours that the workers should carry out throughout the year, without specifying in a rigid manner how they should be distributed. Consequently, the worker can interchange period of extra work and period of major leisure time. Furthermore, the bank of hours foresees the possibility for workers to deposit overtime hours, which could be taken during the year in order to benefit of compensatory rest time. Job sharing[298] is instead a particular working relationship that allows to two workers to carry out the same working activity; its main feature is that workers can autonomously manage the distribution of their working activity and they can freely substitute each other.

The second macro area concern spatial instruments: among them there is the tele-work, that permits, thanks to the use of modern information technology, to work from home instead of the workplace. Modern technologies, in fact, have removed parts of spatial and temporal constraints and have allowed the development of office sharing, teleconference and tele-working, which are only some HR instruments used to facilitate reconciliation between work and family life.

In the third macro-area are included all initiatives put in place by companies with particular reference to family, such as company crèche, children facilities, daycare centers, nursery and childcare services. In addition, other important services concern the economic contribution that some companies give to their employees

[297] In Italy, part-time is regulated by the Legislative Decree no. 61/2000, that implemented EU directive no. 97/81/EC.

[298] Job sharing was introduced in Italy by the Legislative Decree 276/2003, articles 41-45, that executed Law no. 30 of 2003, known as 'Legge Biagi'.

in order to support children's care and studies, as well forms of support for healthcare facilities for elder relatives.

Finally, companies can issue forms of advisory and informative services that derive from agreements and conventions stipulated with third parties. The aim is to provide an higher level of comfort for workers, simplifying activities that they should perform in their leisure time[299]. For this purpose, an internal employee could be charged with doing all these tasks, or such tasks could be committed to external offices, specialized in Lifestyle Management, to which a contribution should be paid. The guiding principle of such activities is to provide time to workers in order to give them real leisure time. For companies which do not want to invest in this kind of activities, they could merely contract an agreement with stores and fitness centers.[300]

## 2. A specific focus on a large Italian company

For the purpose of this research, the case study of a large Italian company is considered for the valuation of results achieved following the application of the principle of work-life balance in the management of human resources, and consequent to the introduction of gender quotas in the Italian legislative framework.

[299] In this kind of activity are included simple activities too, such as the payment of bills, the delivery of documents, the auto maintenance, holiday booking.

[300] See: *People First! Le dimensioni del bilanciamento professionale tra vita personale e professionale: le nuove prassi italiane*, Italian Centre for Social Responsability, 2011, pp. 55- 58. The document is available at: http://www.lavoro.gov.it/ConsiglieraNazionale/Documents/Documentazione/2GuidaFirstPeopleA4B.pdf

## *2.1 The Telecom Italia case study*

Telecom Italia is the main Italian group operating in the field of Information and Communication Technology as well one of the most important players in the Brazilian market. It was founded in 1994 in a merger of several state-owned telecommunication companies, one of which was *Società Italiana per l'Esercizio Telefonico p.A*, known as S.I.P. At present, Telecom Italia is listed on the *Borsa Italiana* and manages a part of connectivity of Internet and Intranet of Italian Public Administration.

What promptly emerged by the company's statements is that it is one of those, in the Italian sphere, that pays much attention to the valorization of human resources, as it believes that the professional contribution of workers is the key success for the company as well an opportunity of growth and enhancement. For this reason, the most urgent task has been for Telecom a cultural change in the organization of work and in the leadership style, in order to break traditional working patterns largely based on control and command. Hence, new strategies started do be adopted, consisting in efficiency, abatement of hierarchies, a greater participation and accountability of workers.

Furthermore, some female characteristics, such as innovation, organizational and programming abilities, collaboration and integration, communication, social intelligence and people's motivation, which were not considered decisive in the previous model, gain a pivotal role for the success.

In this context, on 5 October 2011 the Project *'Direzione Donna'* was launched by Telecom Italia, in order to increase the number of women in the company, in leadership positions too. The project's philosophy is founded on three main goals, which are:

- Increasing women in top positions and supporting other colleagues in getting more challenging aims. New purposes have been given to people working in the area of 'People Value' in the field of diversity, development and education;

- Enhancing women strong points' and raising in them the awareness of greater opportunities of career through coaching, mentoring, skill building among women. Until today, about 1500 women have been interested throughout all over the country.
- Balancing working and private life by increasing business welfare services and network of enterprises. As a consequence, company crèches and kindergartens that have an agreement have been increased of 100%, as well summer holidays, time saving services and well-being areas.

In the framework of the project, Telecom realized in 2012 and 2013 nationwide role model meetings with the aim to value women in professional area. Meetings, which were addressed to employees and managers, intended to create a debate with other women in order to tell their successful experience in the field of entrepreneurship, culture and sport.[301]

From the of work-life balance standpoint, several and consistent initiatives are set up by Telecom, given that the 'anytime anywhere' performance model[302] makes difficult balancing those two parts of life. Telecom makes available 18 kindergartens, and ten of them are inside corporate headquarters of Turin, Milan, Florence, Ancon, Naples, Catanzaro, Palermo and three in Rome; eight agreements have been contracted with other kindergarten in Roma, Padua and Turin.[303]

Furthermore, Telecom offers the possibility to enjoy summer holidays of different kinds (traditional, thematic and study holidays abroad) for its employees' children, which at present about 7000 are involved. And also, forty 'save time' points are available all over the country, such as laundry services, news kiosks and well-being areas.

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[301] Following such meetings an ebook, whose name is *"Leadership al femminile",* has been published. It has been published on the occasion of the world day for the elimination of violence against women.
The document is freely downloadable on the website:
http://www.timreading.it/home.php/ebook-leadership-al-femminile-aavv-cubolibri-988-88-578-1234-7.html

[302] It is a work model which requires unfailing availability and geographical mobility at all times.

[303] Figures are taken on the website: http://www.telecomitalia.com/tit/it/career/joiningTI/people-caring/worklife-balance.html

In order to facilitate workers in the way from home to the workplace and in order to minimize costs and times in biggest cities ( Milan, Rome, Genoa and soon also in Florence), Telecom has realized an Intranet Mobility Area, that provides the possibility to benefit of a car pooling service. Other offices have been involved, instead, with a shuttle service with more than three hundred daily routes.

Another important focus point for the company is the spreading of an inclusive culture, that is possible thanks to the realization of gender diversity policies. On this issue, it has been organized a work group composed by colleagues dealing with different kinds of diversity (ethnic and cultural, gender, religious, disability) in order to promote concrete initiatives, such as the realization of project works on specific issues.

Additionally, Telecom Italia takes part together with other forty companies in a laboratory on welfare and work-life balance, organized by Valore D[304], in order to realize a network in support of small and medium enterprises, that allows the sharing of best practices and the planning of organizational and technical solutions.

In due time, Telecom Italia will open in Ostiense neighborhood a physic and mental space[305] devoted to gender diversity, in which such issue will be faced through collaborations with universities and authorities.

According to what emerged from its declarations, the Telecom case is exemplar for its commitment towards workers, above all women, in order to provide them better possibilities of advancements in career as well better quality of life. For the purposes of this study, it has been examined also which are the main benefits and inconveniences of activating work-life balance policies, in order to perceive if this standard effectively works in the Italian context too, historically influenced by gender stereotypes.

It has been read off that advantages are above all in the motivational sphere: women are more assiduous in terms of time as well concentration. Therefore,

[304] Valore D is the first association of big companies established in Italy in order to support female corporate leadership , getting behind women in the reaching of top positions in order to crack the glass ceiling.
See: http://valored.it/scopri-valore-d/chi-siamo/

[305] That joins the Counseling Centre, already available in Telecom only for some regions, in which professional psychologists offers for free telephone counseling in order to help workers with psychological inconveniences for working and personal reasons.

what is promptly possible to remark is an increased productivity of people, that is probably linked to the fact that workers, by the means of balance policies, could better take care of their relatives. And consequently, better level of engagements and general satisfaction are found, which are determining aspects for the competitive advantage of the whole company.[306]

From the business point of view, even if these policies have the positive mentioned effects and others for instance a better image of company, there are also some difficulties: for Telecom the biggest one is the management of all services they offer throughout the country due to the territorial dispersion. Additionally, given that Telecom has seats in all Italian cities, providing the same kind of service to all staff is expensive; therefore, what usually happens is that offices located in peripheral and less populated areas are neglected.

Following the entry into force of Law no. 120/2011, Telecom must adapt the board of directors and the board of statutory auditors to the quota demanded, that is a fifth of the places for the gender with the least number of representatives. After the first renewal that took place in 2014, the Board of Directors counts five women in thirteen members. The board of statutory auditors instead, will count two members in five of the less represented gender from 2015, that is the year of renewal of the board.

For what concern the benefits observed in almost one year of application, Telecom notes an increased self-confidence and ambitiousness of its female employees, as they can find a good example of working women, from which take inspiration, directly in their companies' CDA. This, at workers' eyes, improve the image of the company and increase the confidence in it. Furthermore, what Telecom emphasizes is the importance of a successful career path, that is the only way to reach top positions. For this purpose, the company offers several possibilities of career that could bring to those ranks, one of which is the already

[306] It is important to emphasize the difference between 'satisfaction' and 'engagement': while the concept of satisfaction recalls to a personal fulfillment, the engagement is linked to a sense of urgency, of motivation and of discretionary efforts. People with an high engagement work with passion and enthusiasm and their attitude reflects on team and company results'.

mentioned project *'Direzione Donna'*, that allows the establishment of training paths for talented women working in the company.[307]

Nevertheless, it is important to add that, in relation to the issue of representation of women, Telecom finds itself in a disadvantage situation: dealing with the field of Information and Communication Technology, the majority of people working in Telecom are engineers and it is widely known that above all men approach this kind of learning. Hence, it could be difficult to include women in the company, which presently are around the 30% of the whole feminine population. Anyways, this trend is going to be reversed as always more girls undertake educational paths much more in line with the company's core business.

On the whole, Telecom Italia reveals to have welcomed the innovative law for gender quotas. According to the company, in fact, the enforcement of quotas foreseeing sanctions in case of non-compliance, is a strong point of such act: in their opinion a legally binding instrument is necessary to achieve more quickly the purpose. Hence, even the EU Directive demanding gender balance in non-executive board member positions would represent a turning point in the valorization of women. In this respect, Telecom fully agrees with what declared by Viviane Reding at the World Economic Forum in Davos: *the example set by countries such as Belgium, France and Italy, who have recently adopted legislation and are starting to show progress, clearly demonstrates that time-limited regulatory intervention can make all the difference.* Thus, in the opinion of the company analyzed, Italy is moving in the right direction to finally give skilled women the chance to meet their opportunity.

[307] *La disciplina sull'equilibrio di genere a due anni dall'introduzione: numeri bilanci e prospettive*, Fondazione Eni Enrico Mattei – Sustainable Business and Social Change, Roma 11 giugno 2014.
The document is available on the website: http://www.feem-sbsc.org/

## 3. An appraisal of the overall situation in the Italian economic fabric

In the previous paragraph, the case study of a large Italian company was provided. According to what asserted, it represents a good example of the fact that, work-life balance and diversity management policies can work and be applied in the Italian context, even if it is historically influenced by gender stereotypes which are deeply rooted in the Italian culture and therefore make difficult realizing gender equality in the labour market.

However, despite this good case, it is necessary to consider the more general Italian business situation, where the vast majority of Italian companies are small and medium-sized enterprises, each one with a number of employees that varies from one to five.[308] In this context, it is not possible to observe, unfortunately, a real culture of diversity management as well a regular application of work-life balance instruments. It is possible to remark, instead, an increased presence of women in the services and care sector: nevertheless, it is widely discussed in this study that this is not the result of a gender culture, but of a system of value in which a woman is traditionally seen as primary carer and family is instead conceived as patriarchal, in which the main and often sole income is provided by the head of the family. This is the heritage of the previous century; at present the Italian family structure is more articulated, with different needs and where the most weak members of society are children and elders.

Under these circumstances, it is possible to note that gender equality normative, despite its good quality, is not enough due to the fact that most of Italian enterprises do not invest in human resources. Legislation, in fact, should be accompanied by a system incentivizing a greater investment in the management of people, in order to make evident that a diversity management strategy is not a luxury, but a necessity that yields great costs saving, and that a better use of

[308] Actually, Italy' s SME sector has an higher proportion of micro-enterprises: small and medium-sized enterprises are 99,9%, in which 94,8 % is constituted by micro-sized enterprises; large companies are instead the 0,1%.
Figures are taken on the document: *2014 SBA Fact Sheet Italy*, European Commission - Enterprise and Industry, 2014. It is available on the website: http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/index_en.htm

people's performance would allow, by the way, the improvement of a company's performance. In this framework, incentive measures could be, for instance, facilitations for those companies which enact work-life balance policies, projects for a better management of diversity management or, in a broader perspective, for a more virtuous corporate social responsibility. On this direction, something of this kind is done with reference to innovative start-up enterprises which could benefit of funding; in particular, for those ones which are exclusively composed of women or young people the maximum percentage of financing could raise to 80%. [309]

One of the most interesting measures to be promoted is tele-work that could represent in the Italian context an innovative and good example for launching business policies closer to gender diversity. Considering that, thanks to the development of new technologies, physical location is relative and tele-work could advantage both workers and employers. From the worker's point of view, it would permit to take care of the own family, so not only of children but also of elders, and to manage autonomously the committed work through web chat, mails and videoconferences; from the employer's point of view, it would allow to optimize costs of equipments, facilities and properties. Nevertheless, although it is regulated by an *ad hoc* regulation[310], tele-work is used little even in the Public Administration.[311]

In this case too, reasons are mainly cultural, given that today the business world is still attached to the idea that the worker, only being present in the workplace and under the supervision of the employer, could perform the best.

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[309] As disposed by the call for tender 'Smart and Start' and by the Decree of the Minister of Economic Development published on the Official Journal on 13th November 2014. It is possible to apply since the 16th February 2015; hopefully, Italian startup enterprises will benefit of this possibility, given that figures in the last three-month report of 2014 of the Register of business show that enterprises with a majority of women are 12% of all startup registered.
Figures are taken on the website: http://startup.registroimprese.it

[310] In case of a Public Administration, it is regulated by Article 4 of Law no. 191 of 16th June 1998, by Decree of the President of Republic no. 70 of 8th March 1999 and by the Framework Agreement on Telework of 16th July 2002; on the contrary, in case of private employers regulation of telework is possible exclusively through negotiations and it refers on the inter-federal Agreement of 9 June 2004, which implement EU Framework Agreement of 16th June 2002 stipulated by UNICE, UEAPME, CEEP and CES.

[311] In Italy, workers employed with tele-work in 2013 were between 2,3% and 5%.
Figures are taken on the website: http://it.dasytec.com/statistiche/telelavoro-statistiche-2013.html

Taking under consideration this scenario, the Italian law on gender quotas and the proposed EU directive on gender balance in corporate boards could obviously be a mark from a cultural point of view. Nevertheless, it is possible to note that companies could sometimes realize a mere formal fulfillment, inserting women as 'tokens'. In order to avoid that and to allow women, contrary, to play an effective role within the enterprise, such normative should be part of a coordinate action: together with a correct application of rules, an advancement in the internal culture should be done through an increased commitment at all levels of society. Only by means of a major cooperation among all actors of society, as trade associations, institutions and chambers of commerce it is possible to achieve a real advancement not only for women, but an increased well-being in the whole society.

To conclude, it is necessary to claim that, apart from Italian big companies as the considered case, the most part of Italian enterprises do not still chose a corporate strategy oriented to gender equality results. Nevertheless, it must be stressed that large ones are more structured and put in practice positive initiatives in this field even before the entry into force of Law on gender quotas. Furthermore, although this act shows the willingness to increase the presence of women in decision-making positions as well as it attests an indication from the cultural point of view, it addresses to listed or state-owned companies, which have already been moving in this direction. Something more should be done in relation to small business too, as *an hoc* law that deals not only with an obligation, that in practice does not always bring to expected results, but also with a system of incentives which instead foster a real advancement in the Italian culture and put forward a decisive achievement of 'substantive equality'.

# *Conclusions*

In the view of the normative on gender balance, the first impression that comes out after a detailed analysis is that an evolution from a legislative perspective is observed both for the EU and Italian framework. With regard to the EU, once the Treaty of Rome set a first definition of equality, merely conceived as equality of pay, a wide range of directives of vary content were adopted. In fact, they focused, in a first phase, exclusively on women and on their being workers, pregnant workers and mothers; hereinafter, they started concentrating on men and fathers, in consequence of the gender mainstreaming and of the parental leave directive, as well on the fact that women should have their possibility to enter in the labour market, to remain there and to advance in their career.

In the Italian legislative context, a similar progression is remarked: initial laws intended to protect the social role of women as mothers, while from here on, thanks to the EU influence too, the legal framework issued measures and strategies aimed at guaranteeing an equality not only of treatment, but also of opportunity. Among these there are positive measures, gender mainstreaming, work-life balance and quotas, which are among the positive ones the most debated type.

Under this scenario, the EU draft proposal and the Italian law on gender balance on corporate boards are the results of the previous legislation but also a new starting point, due to the awareness that self regulation on this issue is not enough. Therefore, the EU proposal and the Italian Law aim at becoming the binding instrument that imposes the change in order to face gender imbalance in the boards of large companies, whose effect will induce positive outcomes in the near future on other issues still problematic for the majority of women, for instance the reconciliation of private and professional life.

Nevertheless, what emerges from the research conducted for this study is that, in relation to Italy, such legislation is in direct contrast to the reality: a reality where a constant application is lacking, in which the absence of a cultural model and of a symbolic context in which setting the change is evident. To put it differently,

legislation is too progressive in comparison with the Italian social situation and it cannot represent a driving force as, what is remarked, however, is an absence of continuity of Institutions dealing with gender equality. This pessimistic situation is confirmed, for instance, by the low fertility rate. It is expression of the fact that, among the reasons that do not push young people to becoming parents, there is also the uncertainty of the labour market and the ineffective support for mothers and fathers.

Hence, under such scenario, setting juridical obligation is not enough: legislation should be, in fact, part of a coordinated action which focuses on each side of society, starting from families and arriving to high levels. Only in this way, from the bottom up, it could be possible to build the social awareness that gender balance is not only an assertion of rights, but above all an investment in innovation, in human capital, in the well-being of Italian society.

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Law no.125/1991 *for Positive Actions*

Law no.53/2000 *for the support of mothers and fathers*

Legislative Decree no. 61/2000, *that implemented EU directive no. 97/81/EC* concerning the Framework Agreement on Part-time work concluded by UNICE, CEEP and ETUC

Legislative Decree no. 151/2001 *on protecting and supporting parenting*

Legislative Decree no. 276/2003

Legislative Decree no.198/2006 *Code for Equal Opportunities between men and women*

Legislative Decree no. 5/2010 *implementing Directive no. 2006/54/EC concerning the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation*

Law no.120/2011 *Amendments of the Unified Act of rules on financial intermediation, provided under Legislative Decree 24 February 1998, no. 58, concerning the equal right of appointment in managing and supervisory boards of companies listed in regulated markets*

Decree of the President of Republic no. 251/2012

CONSOB Resolution 18098 of 8 February 2012

*Attachment 1. Research tool*

*Candidato*: Carola Russo *Relatore*: Marcello Di Filippo

UNIVERSITÀ DI PISA

Tesi di laurea sperimentale in Studi Internazionali (LM-52)

## L'effettività delle politiche di genere tra le aziende italiane

*Questionario*

| **AREA 1. Cultura aziendale della diversità di genere** |
|---|
| Cosa significa per la sua azienda "Gestione della diversità di genere"? |
| Sono state realizzate azioni di *diversity management* nella sua azienda? Di che tipo?<br>• Pratiche di *work-life balance*<br>• Campagne di sensibilizzazione contro la discriminazione di genere sul lavoro<br>• Formazione per dipendenti nel settore delle HR |
| Perché è stato necessario attivare politiche di bilanciamento vita-lavoro? Quali sono i benefici delle stesse e le principali criticità? |
| |
| **AREA 2. Entrata in vigore della legge no.120/2011 (Legge sulle quote di genere nei Consigli di Amministrazione delle società pubbliche e delle società quotate)** |
| Qual è l'opinione della sua azienda a riguardo? Considera la legge necessaria ed adeguata? L'inserimento di sanzioni in caso di inadempienza è un punto di forza o sarebbe stato meglio scegliere un approccio volontario? |
| Dal primo rinnovo conforme a legge, che ha previsto una quota pari ad almeno un quinto dei membri del Consiglio di Amministrazione da destinare al genere meno rappresentato, ci sono stati maggiori effetti positivi sulla performance? Quali? |
| I Consigli di Amministrazione sono più vicini al welfare impiegatizio? (Ad esempio, la maggiore presenza di donne rende l'azienda più sensibile alle problematiche di work-life balance? È cambiato lo stile manageriale?) |
| Ad oggi, ci sono stati altri tipi di effetti (positivi e/o negativi) non considerati nelle domande precedenti? |
| |
| **AREA 3. Proposta di una direttiva UE sull'equilibrio di genere tra gli amministratori senza incarichi esecutivi delle società quotate in borsa** |
| Quale sarebbe la posizione della sua azienda di fronte ad un'eventuale direttiva europea di questo tipo? |

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